BULLETIN, UNIVERSITY OF KENTUCKY
University Extension Series

LEGAL TIDBITS FOR WOMEN

by

William
W. Lewis Roberts, Professor of Law
College of Law, University of Kentucky
Lexington

UNIVERSITY OF KENTUCKY

DEPARTMENT OF UNIVERSITY EXTENSION

LEXINGTON

Volume XV March, 1936 Number 3

TABLE OF CONTENTS

FOREWORD

In presenting this series of studies, it is not the thought of the writer that they will aid their readers to become sufficiently versed in the law so that they can solve their own legal problems. He is too thoroughly convinced of the truth of the old saying that he who acts as his own lawyer has a poor adviser and a fool for a client. He also recalls the statement of an old practitioner at the bar who said he never ceased to thank the Lord each night that people had not ceased to draw their own deeds and to write their own wills, because he made his living out of the mistakes they made. The writer will feel well repaid if in presenting these studies he shall thereby lead some reader to realize the need of consulting a lawyer when she has a problem involving a legal principle; or if he can convey the least gleam of the fascinating field the law presents. He fully realizes that when dealing with the law, it is not enough to make a noise like a lawyer, as someone has said, but to think like a lawyer and that requires years of legal training.

DOMESTIC RELATIONS

There has grown up around the family relation a body of law sometimes treated under the heading of persons and sometimes under the title domestic relations. Occasionally we find it under the name family law. It includes the law governing marriage, separation and divorce; husband and wife, married women, and parent and child, guardian and ward, infants.

Marriage, Separation and Divorce. The marriage relation is entered into by contract, but when marriage once becomes a fact, it is a status and no longer a contract. What do we mean by that? Just this, the parties to the contemplated marriage may agree in black and white with as many seals on the parchment as you please; that the wife shall make no claims on the husband for support; that if either wishes to be unfaithful to the marriage relationship, he or she may be; that in the case of divorce, the wife shall not have alimony; that in the case of children by the marriage the wife shall not have the custody of them upon the husband's death; that either may terminate the relation at will; or that any of the usual incidents of the relation shall not apply to this particular marriage, the law will ignore all such agreements and enforce all the rights and duties that it imposes on the relation. You can get into the relationship by contract, but the law does not recognize in you any right to get out of it in the same way. It is a status just as the relationship between parent and child is a status into which the child is born, and the law determines what the incidents of that relationship shall be.[1]

Who may enter into lawful marriage is determined by our statutes. There is a long list of persons disqualified from marrying each other because of blood relationship or relationship by marriage. Also marriage with an idiot, between whites and negroes and mu-

1. Peck, Domestic Relations, 129

lattoes, with a person who has a lawful husband or wife living and has not been divorced is void, and a marriage is also declared to be void when not solemnized or contracted in the presence of an authorized person or society.[2] This last provision abolished the so-called common law marriages in this state. Under the common law if a man and woman made a present declaration accepting each other as husband and wife and thereafter lived together as such, the law regarded them as married. It was a marriage by reputation.

Before a marriage can be solemnized, a license must be procured from the clerk of the county court of the county where the woman resides at the time, but if she is a widow or of full age, it may be issued to her on her signed application by a county clerk.[3] This license is to be filled out by the officiating clergyman and returned to the clerk within three months of the marriage.[4] Where either party is under twenty-one years of age and has not been married before, no license is to be issued without the consent of parent or guardian. This consent must be certified to in writing. Where the marriage is brought about through fraud or one of the parties is under age and like causes, the court may declare the marriage void. This is an annulment of the marriage and is a judicial announcement that there never was a legal or valid marriage. It is not the same thing as divorce. Divorce is based upon the assumption that there was a legal marriage which the court terminates by granting a divorce.[5]

The grounds of divorce vary in the different states. South Carolina, at one extreme, grants none at all; Nevada, on the other hand, has no difficulty in finding a cause for any one who wants a divorce. In Kentucky a divorce is granted to either a husband or a wife for impotence, abandonment for one year.

---

2. Carroll's Kentucky Statutes, Sections 2096, 2097.
3. Ibid., Section 2105, 2096, and 2097.
4. Ibid., Section 2107.
5. Ibid., Section 2115

adultery, conviction of felony, concealment of a loathsome disease, force or fraud in obtaining the marriage and, uniting with a society that requires renunciation of the marriage covenant. A divorce is granted to a wife for confirmed habits of drunkenness on the part of the husband for a period of not less than one year, for cruelty, and for the husband's habitually behaving towards her in such a manner as to show an aversion to her or to destroy permanently her peace of happiness. A divorce will be granted the husband where the wife is pregnant by another man at the time of marriage and the husband had no knowledge of that fact, where there is habitual drunkenness on the part of the wife for a period of not less than one year when the husband is not in like fault, and where the wife is guilty of adultery or of lewd behavior.[6] Divorce may also be granted from bed and board. The parties are still husband and wife but do not live together. In either form of divorce a wife may be granted alimony, either in a lump sum or in regular stated installments. The court, upon granting a divorce, will adjust the property rights of the parties and will also determine who shall have the custody of the children, if there be any. The woman is allowed to assume her maiden name if she so desires.

Our statute further provides that the father and mother shall have joint custody of their minor children. On the death of either, the guardianship goes to the survivor, if she or he is a proper person for such trust. The same section reads that the father shall be primarily liable for the support of his minor child or children and that the husband or the wife may appoint by will a guardian at his or her death.[7] There is also a section which allows any person over twenty-one years of age to adopt a minor child, provided if he or she is married, the consent of the other spouse is secured for the adoption. Such an adopted child becomes capable of inheriting the pro-

6. Ibid., section 2117.
7. Ibid., section 2016.

perty of the adopting parent.[8]

Support. At common law, the husband was obliged to support the wife. This was not so great a hardship as it might at first seem, as the law gave the husband all the personal property belonging to the wife at the time of the marriage. It gave him the right to reduce to possession and thereby become the owner of all her choses in action, that is her claims against other people. It also gave him the rents and profits during the time the marriage lasted from all the wife's real estate. These rights tended to alleviate in a measure the burden of support placed upon the husband's shoulders. Since he got all the property that might have otherwise been looked to for the payment of her debts incurred before the marrage, he became liable for such debts. And therein was much good material for the novelists writing of the period of the Stuarts in England. Many a noble woman of that period of hard and fast living, rushed to a prison and married a man condemned to die and unloaded on him her debts incurred at the gambling table. The marriage freed her of the debt of honor and the executioner immediately relieved her of an undesirable husband. She could then step forth with a clean slate, ready to begin life anew.[9]

Under the Kentucky statute the husband is not liable for any debt or responsibility of the wife contracted or incurred before or after marriage, except to the amount of value of the property he may receive from or by her by virtue of the marriage but shall be liable for necessaries furnished to her after marriage.[10] The married women in Kentucky are more fortunate than they are in some

---

8. Ibid, section 2072
9. Schouler - Marriage, Divorce, Separation and Domestic Relations, sections 76, 77
10. Carroll's Ky. Stat., section 2130

states under modern statutes; for in Nebraska, for instance, their property may be taken in satisfaction of bills incurred in support of the family.[11] The law, without the help of statutes, had reached the result that the husband was liable for necessaries furnished the wife. It did this on the ground of agency and not of the marriage relation. "Marriage and cohabitation do not as matter of law, regardless of facts, imply authority in the wife to pledge her husband's credit," is the way one authority puts it.[12] Where a husband and wife were both employed in managing a hotel, a jury found that the husband had withdrawn the authority of the wife to pledge his credit. The authorization in such case must be found in the circumstances.[13] In another case a man and woman went through the form of marriage. The marriage was invalid because the woman had a husband by a prior marriage living from whom she had not been divorced. Before the man discovered that fact and had had the marriage annulled, the woman had bought on his credit household goods and also a fur coat. The court held that the firm from whom the goods were bought had a right to have the jury decide whether there was an implied agency and a ratification on the man's part.[14] This shows that the presumption of an agency arises from cohabitation even though the woman was not the defendant's wife since he held her out as such and she was in charge of his household. The burden is on the person supplying the wife with credit to establish the implied authority in the wife. The husband may forbid supplying her with goods on his credit. If he wrongfully turns her out of his home, one supplying her with the necessaries of life may nevertheless, recover the

11. 15 American Law Reports, 835
12. Madden - Domestic Relations, 185
13. Debenham v. Mellon, 1880, L. R. 6 App. Cas. 24
14. Jordan March Co. v Hedtler, 1921, 238 Mass. 43, 130 N. E. 78

value of the goods supplied. However, where the wife is wrongfully living apart from her husband the husband is not liable even for medical bills, and this is so although the doctor rendering the medical service did not know that the wife was living apart from her husband. Had the doctor attended her on former occasions and sent the bills to the husband and he had paid them, then we might imply an agency to pledge the husband's credit on this particular occasion, no notice having been given the doctor by the husband.[15]

Some very interesting questions arise as to what are necessaries which may be supplied the wife on the husband's credit. Money is not so regarded as a general rule. So while you may furnish groceries to the wife who is living apart because of the husband's fault and has not been supplied with the necessaries of life; you cannot give her the money to go to the grocery and buy them and expect to recover from the husband. In some states a person so supplying money with which to buy necessaries is allowed to be subrogated to the rights of the person actually selling her the goods, that is he may stand in the "shoes" of the grocer and recover.

Where the wife is justifiably living apart from her husband, she may ask the court to compel the husband to give her separate maintenance.[16]

Under the old law governing family ties, the husband was entitled to any wages the wife might earn. As a result it followed that if anyone wrongfully injured the wife, the husband might recover for loss of services. It has been held under some of the statutes giving a wife property rights that this right of the husband to recover for loss of the wife's services has not been changed. Under other statutes if he has been put to expense for medical services and the like, he is entitled to

---

15. Vusler v. Cox, 1891, 53 N.J.L. 516, 22 Atl. 347; Davis v. Davis, 1925, 208 Ky. 605, 271 S.W. 659
16. London v.London, 1925, 211 Ky. 271,277,S.W. 287.

an action as well as the wife, if she has been injured through the negligence of a third party. At common law, the husband was entitled to recover in such a case for loss of consortium, the companionship of his wife. After the Married Women's Acts were passed the question arose whether the wife were entitled also to recover for loss of consortium where the husband was injured. Some few cases hold that she was, but the tendency has been to deny both the husband and wife any recovery for consortium under the modern statutes.[17]

Either the husband or the wife has a cause of action against one who entices the other away or alienates his or her affections. However, if the parents of the wife advise her to leave her husband no action will lie unless improper motives are shown.[18] A stranger should not volunteer in such matters. Possibly if a friend were to say to a wife, "If I had such a husband I would leave him in a hurry," it may be doubtful whether he or she would be liable. Where the wife seeks advice and it is honestly given and represents the defendant's real opinion, he should not be held liable; but if he does not honestly advise or advises with a malicious motive, he is liable.[19] There is an interesting Minnesota case where a man employed a detective agency to "shadow" his wife and see what she did at certain times when absent. The detectives shadowed the wrong woman and as a result the husband falsely charged his wife with conducting herself in an immoral manner. She left him as a result. He sued the detective agency for alienation of his wife's affections. The court held he could not recover as no case based upon negligence

17. Bolger v. Boston Elevated Ry. Co. 1910, 205 Mass 420, 91 N.E. 389
18. Allcock v. Allcock, 1917, 174 Ky. 665, 192 S.W. 853.
19. Tasker v. Stanley, 1891, 153 Mass. 148. 26 N. E. 417.

would support an action for alienation of affections.[20]

Since a wife can now sue and be sued in her own name, can she sue her husband for injuries received because of his fault? There are no decisions both ways. The Kentucky court said that section 2128 of the Statutes does not confer upon either spouse the right to sue the other for injuries due to that other's fault.[21]

Life insurance policies to-day are generally resorted to by the heads of families to make provision for the dependent members of the family. It has been long settled that one spouse has an insurable interest in the life of the other and can take out a valid insurance policy on the life of the other. What happens to the beneficiary's interest in the insurance when there is a divorce? The overwhelming weight of legal authority is that divorce does not terminate the spouse's interest. This, however, is not the rule in Kentucky. Where the wife is beneficiary in an insurance policy covering the life of the husband, and there is a divorce, she cannot collect on the policy, if he shortly afterwards dies.[22] The court held that section 425 of the Civil Code and section 2121 of the Kentucky Statutes divested the wife of her rights in the policy upon divorce. This would not be true if the wife took the policy out on the life of her husband and paid the premiums with her own money.

Children. Under common law principles, a father is obliged to support his children who are of tender years. The father was entitled to the custody of his children and was also entitled to any earnings

---

20. Lilligren v. Burns International Detective Agency, 1916, 135 Minn. 60, 160 N. W. 203.
21. Dishon's Admr. v. T. E. Dishon's Admr., 1920 187 Ky. 496, S. W. 794.
22. See v. Conrad, 1913, 155 Ky. 51, 159 S. W. 622.

they might make. If any employer paid the minor child for labor, and the father had done nothing to lead him to believe that he could safely pay the minor, the father could force him to pay again. It did not follow that where the child had property left him, possibly by a deceased grandfather, that the father was the guardian of the child's property. The fact that he was guardian of the person of the child did not make him guardian of the property. To become guardian of the latter, he must apply to the proper court for an appointment. A father who deserts a child under the age of six years is subject to criminal prosecution under section 329 of the Kentucky Statutes. As a correlative of this section, we find section 331f subjecting any adult person capable of earning sufficient means of supporting a destitute parent to imprisonment if he fails to provide for such parent.

A child born out of lawful wedlock is deemed illegitimate, the child of nobody. If a man having such a child by a woman subsequently marries her, such a child or its descendants, if recognized by him, before or after marriage, is thereby made legitimate.[23] Children of a bigamous marriage, a marriage with a person having a lawful spouse living at the time of the marriage from whom no divorce has been secured, are rendered legitimate by statute.[24] This is the so-called Enoch Arden marriage, where one of the parties has been long absent and the other supposing the absent one to be dead has married again. Thereafter the missing spouse returns to find his former mate raising a family as a result of the second marriage. The statute also makes the issue of illegal or void marriages legitimate except issue of an incestuous marriage, found such by conviction or judgment of a court in the lifetime of the parties, or the issue

23. Carroll's Ky. Statutes, section 1393.
24. Ibid., section 2099.
25. Ibid., section 2099.

of a negro and a white.[26] The issue of a lunatic or idiot are legitimate.

Infant's Contracts. An infant's contracts are voidable at law. The law regards all persons under the age of twenty-one as infants. Now what is meant by saying that their contracts are voidable? The infant can set aside his contract if already executed, or if still to be performed by him, he may decide that he does not care to go on with it. The contract is binding on an adult, however. The right to avoid his contract is a protection thrown around the infant by the law because of his inexperience in dealing with business problems. If the infant has consumed or squandered what he received from the adult, he can renounce his contract just the same and demand back what he gave. If he still has the consideration he received, he must return it to the other party. An infant cannot bind himself by ratifying the contract before he becomes twenty-one years of age. If he keeps what he received from the contract after becoming of age and makes no move to renounce the contract within a reasonable time, he is said to ratify by acquiescence.

An infant cannot repudiate his marriage on the ground of infancy. He may contract to marry, but he cannot be held liable in a suit for breach of promise. The adult with whom he enters into the contract cannot avail herself of the infant's right to avoid the contract. That is just what the adult tried to do in the early English case of Holt v. Ward Clarencieux.[27] There the plaintiff, an infant, sued the adult for breach of promise and the defendant pleaded the plaintiff's infancy by way of defense to the action. The court held this plea was not available to the adult.

---

26. Carroll's Ky. Statutes, section 2098.

27. K. B. 1732, 2 Strange, 937.

An infant is said to be bound on a contract for necessaries. Again we are confronted with the question of what are necessaries? Food, shelter, and clothing clearly are. In an early Massachusetts case, one who made repairs on a house belonging to an infant, sued for work and repairs. He was successfully met with the defense of infancy. He had not supplied the infant with necessaries, and the infant was allowed to avoid liability on the contract.[28] In an early Vermont case, the court took the position that a college education was not a necessary to a minor boy and refused recovery when the college sued him.[29]

Suppose when the credit is given the infant, he tells the person with whom he enters into the contract that he is over twenty-one years of age. Will his false representation prevent his pleading the defense of infancy when he is sued? Take a concrete case. A minor took his car to a garage for repairs. When he demanded the car without offering to pay for the work done on it, the garageman held the car under a claim of a lien for repairs. The infant sued, and to the claim of a lien replied that he was an infant. The garageman then answered that the infant fraudulently represented that he was twenty-one years of age. The court there held the infant could not claim this defense where he had made such a representation.[30] This is not the general rule, however, but it is the law in Kentucky. If he here makes a fraudulent representation or concealment as to his age, which misleads the other party, he will not be allowed to avoid the contract on the ground of infancy.[31]

Although courts talk about holding an infant on his contract for necessaries, they do not really hold him on the contract as such but hold him for

---

28. Tupper v. Codwell, 1847, 21 Metc.(Mass.) 559.
29. Middlebury College v.Chandler,1844, 16 Vt683.
30. La Rosa v.Nichols,1918, 92 N.J.375,105 Atl. 201.
31. Pinnacle Motor Co. v. Daugherty,1929, 231 Ky.626, 21 S. W. (2d). 1001.

the value of the necessaries furnished him. The contract price is only evidence of what the goods supplied are worth. This is readily seen when an infant is sued on a promissory note given in payment for necessaries. A recovery will be allowed but not necessarily for the face value of the note but for the value of the goods furnished the infant.

Suppose that an infant is the holder of a negotiable instrument, a promissory note or a check, and he endorses it to some one. He later wishes to repudiate his contract. He can get the note back. However, if he does not care to upset the transfer, it will be a good transfer for the purpose of passing the property rights in the check or note. Our statute on Negotiable instruments so provides.[32] There is also a statutory provision allowing a bank to pay a deposit to an infant.[33]

In conclusion, it may be said that this right given an infant to set up his infancy when sued on a contract is not wholly a blessing to him. Business men have learned by experience that they deal with an infant in business matters at their peril and this makes it difficult for an infant to carry on business. In some states there are statutes taking away this defense where the minor is carrying on a business. Then, too, he may be the owner of land and have a very advantageous offer for it. The buyer might not be willing to take a chance on the infant's standing by his contract and therefore unwilling to deal with him. Even here the infant may have a legal guardian appointed by the court and then have the guardian petition the court for the right to sell the land.[34] Such a guardian has statutory authority to make leases of the infant's real estate.[35]

---

32. Carroll's Ky. Stat., section 3720b-22
33. Ibid, section 591
34. Civil Code, section 489
35. Carroll's Ky. Stat., section 2031, 2031a-2

CONTRACTS

A contract is a promise or a group of promises which the law will enforce. The law does not enforce simple promises as such, but promises supported by a consideration. In the early days of our law, if a man made a promise and got something for it, and failed to keep his promise, he was held answerable for fraud. So our law of contracts had its origin in fraud. It was deemed fraudulent for him to keep what he had received for his promise.

Contracts are either unilateral or bilateral, that is, either one sided or two sided. Let us see what that means. If I say here is my book, pay me five dollars for it tomorrow; and you take the book, then I have a contractual claim against you for the five dollars. That is a unilateral affair. Only one person is obligated. An act is usually called for on the part of the other person. If you say to me, if you will sell me your book I will pay you five dollars for it tomorrow, and I say that I will sell it to you; there is a bilateral or two sided contract since two persons are bound by promises. It calls for an offer on the part of one of the parties and for an acceptance on the part of the other. The mutual promises supply the consideration, the one for the other, the quid pro quo, as lawyers say, the something for which you make the promise. There are other classifications of contracts besides unilateral and bilateral. We speak of express and implied contracts. Where both parties express their promises in words, oral or written, the contract is said to be an express contract. Where the promise is implied from the circumstances or acts of the parties, it is called an implied contract. For instance, the marketman may leave a basket of supplies on your door step, thinking that you had ordered it when you had not. If you take the supples and use them, he can hold you on an implied promise to pay for them, since you knew or should have known that he expected pay for them and was not making you a gift of the basket

and contents. Then there are also contracts raised by implication of law, imposed on a person by the law, where he would be unjustly enriched at the expense of the other person if the law did not impose the contract. Suppose that I pay the taxes on a piece of land which belongs to you, under the mistake that the taxes cover my land only. There I should be able to recover from you the tax paid on your land. This does not hold true where one man voluntarily steps in and pays the debt of another. The law there will not help the volunteer. There must be some mistake or some good reason why it would be unjust not to allow the recovery.

Offer and Acceptance. Contracts are ordinarily made through some one making an offer and another person accepting that offer, as has already been suggested. Now an offer to enter into a unilateral contract calls for some act. Suppose that A says to B, "If you will mow my lawn I will give you a dollar." Suppose that B says, "All right." The next day A has C mow the lawn. B has no legal cause of action against A for breach of contract. A did not ask for a promise from B. He asked for a completed act, namely, the mowing of the lawn. Suppose that instead of offering to pay one dollar for having the lawn mowed, A said to B, "If you will promise to mow my lawn for me, I will promise to pay you one dollar." There we have an offer to enter into a bilateral contract. If B promises to mow the lawn in that case, and I employ someone else to do the job before he has had a chance to do it, I will be liable to him for breach of contract.

The law does not require that the consideration to be given by one party shall have the same value as that given by the other party. It does not look to the worth of the thing given, except where money is given for money.[1]

An offer to enter into a contract may be with -

1. Williston-Contracts, Section 115.

drawn before it has been accepted, unless something has been given to hold the offer open. In such case it is called an option, which is binding until a certain time has elapsed.[2]

How is it at an auction? Does the auctioneer make the offer or does the bidder? The general understanding is that the bidder makes the offer to enter into a contract of sale and that the auctioneer can refuse to accept the bid in the absence of statutory provisions governing the matter. The statute in Kentucky states that the sale is complete at the fall of the hammer. Until the hammer falls either the bidder or the auctioneer can withdraw. If the sale is announced to be without reservation, the auctioneer cannot withdraw the goods when once offered. Unless the sale is announced subject to the right to bid on behalf of the seller, it is unlawful for him to bid or for anyone to bid in his behalf.[3]

Contracts may be entered into by correspondence. They may consist of a series of letters. Where one has made an offer by letter, the contract is completed by the mailing of the acceptance, not by its receipt by the offeror. It therefore follows that if after one has made an offer to sell his farm, Blackacre, by sending a letter to the prospective buyer and then changes his mind and decides that he does not want to sell, he must get notice of his change of mind to the prospective purchaser before the latter has dropped a letter in the mail box accepting the offer. Otherwise, he can be held to his original offer.[4]

Charitable subscriptions present an interesting problem in the law of contracts. If I promise to give a tramp twenty-five dollars with which to buy an overcoat, and later decide that I will not do so, he has no legal claim against me. Mine was a mere gratuitous promise, unsupported by an consideration, a mere promise to make a gift. If I sign a subscrip-

2. Ibid., Sections 51-61.
3. Carroll's Ky. Stat., Sec. 2651c-21; Williston - Contracts, Section 29.
4. Williston - Contracts, Section 29.

tion paper intending to make a gift of one hundred dollars towards the repairs of a church, the law will enforce my promise as a binding contract. Courts have been hard put to it to sustain this result on strict contract principles. If the church officials go ahead and make expenditures in reliance on the pledges made, some courts have said these outlays supply the consideration for my promise. Some courts have said that the acceptance of the subscription supplies the consideration. Others have said that the mutual promises of the subscribers supply the necessary consideration, that is your promise to give the amount set opposite your name supplies the consideration for my promise to give the one hundred dollars.

Another interesting situation involving consideration is the payment of part of a claim in satisfaction of the whole claim. If I owe you one hundred dollars and you write to me that if I will send a check for seventy-five dollars, you will call the whole debt off; and I send you a check for that amount, you can immediately turn around and sue me for the balance of the one hundred dollars. This is so because in paying the seventy-five dollars I have given up nothing I had a right to keep, I have parted with nothing in consideration for your promise to release me from the payment of the additional twenty-five dollars. Had the claim been for an unliquidated amount, an amount to be determined, the result would have been different. Had I given you a check from a third party or a note of a third party, the settlement would have been binding, because there I am giving you something you are not entitled to have of right, even though the third party's check or note has no greater intrinsic value to you than my check has.[6] It follows that a check sent in "full or all demands" or "in full payment" of a liquidated claim-a claim for a definite amount -- and cashed by the creditor, will not bar a suit for the balance; but

5. Williston - Contracts, section 116.
6. Ibid., section 120.

if sent for an unliquidated claim, it will.

Parties to a Contract. Not all persons can make a binding contract. (1) Persons under twenty-one years of age are spoken of in the law as infants, though they may be held liable for necessaries, their contracts are said to be voidable. When sued, an infant may plead his infancy as a defense to a recovery of judgment against him. He may repudiate his contracts, other than for necessities at any time and demand back the consideration he has given, even though he cannot return what he has received. (2) As there is said to be a meeting of minds in a valid contract, an insane person is also under a disability, as is (3) a drunken person; and (4) married women, under the old common law. They still are in some fields. At common law the married woman was incapable of making contracts that would bind her during coverture - during the existence of the marriage relation - because on her marriage she lost her legal identity. It was merged in that of her husband.[7]

All this has been changed by the so-called Married Women's Acts. That of Kentucky was enacted in 1893 and 1894. In addition to giving a married woman property rights, it provided that she might make contracts, sue and be sued, as a single woman, except that she may not make any contract to mortgage or convey her real property or deed the same, unless her husband join in the contract to convey or in the deed.[8] The same statute also provided that no part of a married woman's estate should be subjected to the payment of any liability, upon a contract after marriage, to answer for the debt, default or miscarriage of another, including her husband; that is she cannot be a surety for her husband or anyone else.[9] There are numerous cases, however, where the debt is

7. Eversley - Donestic Relations, p. 262.
8. Carroll's Ky. Stat., Section 2128.
9. Ibid., Section 2127.

incurred was held to be the wife's debt and not that of her husband, and her estate was held. She may appoint her husband her agent to incur the debt and her estate will be subject to the same.

Since the wife can contract as an unmarried woman, she may contract with her husband, and, if need be, sue him on the contract,[10] or for any debt he may owe her. In Kentucky it has been held that a wife may enter into a business partnership with her husband.[11] This is not the case in all states.[12]

Statute of Frauds. We have on our statute books an act that requires that certain contracts must be evidenced by writing. Contracts by executors or administrators to answer from their own estates for a duty of their decedents' estates; contracts to answer for the debts or defaults of another; contracts in consideration of marriage; contracts for the sale of any interest in land; contracts not to be performed within one year; and contracts for the sale of goods of five hundred dollars in value, unless the buyer accepts or receives a part, or gives something in earnest or in part payment thereof; must be in writing or evidenced by writing. The first of these seems clear. As to the second, some difficult questions arise as to when a promise is to pay your own debt or the debt of another. Take the case where A has a tenant on his farm, and the harvest season is well advanced, and A is worried because the wheat has not been threshed, for he knows that if it is not attended to in time, he will not get his rent money. He sees B, who is operating a thresher in the neighborhood and tells him if he will hurry up and thresh the wheat for the tenant that he, A, will see that B gets his money for threshing. The tenant does not pay, and after waiting a year B en-

10. Coleman v. Coleman, 1911, 142 Ky. 36, 133 S.W. 1003.
11. L.& N.R.Co. v. Alexander, 1894, 27 S.W. 981, 16 Ky. L. Rep. 306.
12. Note, 20 A. L. R. 1304.

ters suit against A. A's lawyer pleads the Statute of Frauds as a defense to the action, that is that this is an oral promise to answer for the debt of another and is not binding as the Statute requires that such contracts be evidenced by writing. An appellate court in such a case has held that the promise was not within the Statute, that the wheat would not have been threshed but for the defendant's promise and that the plaintiff was really doing the job for A, the defendant, not for the tenant.

Take another case. Suppose that A's young son hurls a few stones through the windows in B's hothouse, and B is about to start prosecution of the boy for maliciously destroying property. A promises B that he will pay the damages. He is not bound by his promise to answer for the miscarriage of another for it must be evidenced in writing. Had A sat down and written a letter saying that he would pay the bill, he would have been bound.

Take a third case. A accompanies his niece on a shopping tour of the department stores. She finds just the dress she wants and asks to have it charged. The store manager refuses to give her credit. A then promises that "it will be all right." "I will see that my niece pays you." He is not bound, as it is an oral promise to answer for the debt of another. Had he said," All right, charge it to me," the sale would have been to him, and he would have been liable.

When the Statute says that contracts in consideration of marriage must be evidenced by writing, it does not mean that the mutual promises to marry must be so evidenced. A promise to marry is not a promise in consideration of marriage. If A tells B that if the latter will marry C, A's daughter, he, A will give B a deed of his farm Blackacre; such a promise would be in consideration of B's marrying C and would be within the meaning of the Statute.

The writing required by the Statute does not have to be made at the time the promise or contract is made. All that is required is that the writing signed by the party to be charged shall be in exis-

tence at the time it is required as evidence. An interesting case where the court missed this point was recently decided in South Dakota.[13] A husband and wife after marriage made a memorandum of an oral pre-marriage agreement, in which the wife waived her right to any of the husband's property at his death and accepted a stipulated annuity in place thereof. The court held the memorandum did not validate the oral ante-nuptial agreement. The statute in that state said that contracts not in writing should be void. The result would be otherwise in states where statutes provide that certain contracts not in writing shall be unenforceable. The recent Kentucky cases, however, agree with this South Dakota case.

A typical case illustrating oral contracts in regard to land is where a man agrees to leave his farm to his nephew if the nephew will continue to care for the uncle. An oral promise to devise land has been uniformly held to be within the Statute.[14] Finally, there are the contracts which are not to be performed within one year. They must be in writing. If they can be performed within one year, altho it turns out that they are not performed within that time, they are valid although not reduced to writing. Suppose that A agrees to marry B at the end of five years and there are no love letters passing between them that set forth the terms of the agreement so that they could be used as the necessary memorandum. If the next year B changes his mind and marries C, A could not successfully sue B for bread of promise as the agreement was not in writing. The Kentucky court held an oral contract to last for five years or as long as the promisee should remain in business valid; since he might go out of busines within a year, and the contract therefor be performed within a year.[15]

13. Peterson v. Peterson, 1929, 55 S.D. 457, 226 N.W. 641.
14. Drake v. Crump, 1919, 185 Ky. 323, 215 S.W. 41.
15. Standard Oil Co. v. Denton, 1902, 24 Ky. L. Rep. 906, 70 S. W. 282.

The highest court of Washington held good an oral agreement made on November 28, 1930, to sell all the respondent's 1931 apple crop; since the court could not say that the crop might not be sold before November 28, 1931; that is within one year from the time the agreement was made. The test is whether the contract, by its terms, must endure longer than one year. It is immaterial that the contract in fact does extend over one year.[16]

The provision that contracts for the sale of wares, goods, and merchandise over a certain value, five hundred dollars in this state, ten pounds under the old King James statute, must be in writing; gives rise to many interesting problems. What is a sale of goods? A man orally orders wooden fencing of a larger size than the stock in trade. It was made by a third party. The court held that this was a sale of goods, and the contract must be evidenced by writing, signed by the party to be charged in order to be enforceable.[17] The courts have usually drawn a line between contracts calling for labor and contracts calling for a sale. If the goods are to be manufactured, the majority of courts say it is not a contract calling for a sale. According to this view, the fencing case was not properly decided. The purchases should have been held on his oral promise to pay.

Statute of Limitations. Not only must promises be supported by consideration and some be evidenced by writing signed by the party to be charged, but claims arising out of contracts as well as those arising from other sources must be enforced within a certain time. In popular language, they are said to outlaw by lapse of time. This outlawing claims

---

16. 1926, 137 Wash. 148, 242. Pac. 3.

17. Brook Iron Works v. Cohen, 1930, 246 N. Y. Supp., 329.

against third persons is wholly a matter of statutes. Under the Kentucky statute actions relating to real estate must be brought within fifteen years from the time the cause of action first accrued. The same time is provided for actions on written contracts, promissory notes - provided they have not been negotiated - bonds, judgments, and the like. For most other actions, the period is five years. Bills of exchange, for instance, come within this period. A check is a common form of a bill of exchange with which we are all familiar. A promissory note is outlawed in fifteen years, but if it is negotiated by endorsement and delivered to anyone, then it is put on the basis of a bill of exchange and will be unenforceable five years after it becomes due.[18] In the case of real estate actions, if the party having a claim is under a legal disability, then a certain time is allowed after such legal disability is removed, as in the case of the infant's becoming of age. Under the statute, a married woman comes within the list of persons under disability. The Married Woman's Act did not change this provision, and today she has a certain time after the marriage comes to an end in which to sue. There are some actions that must be brought within a shorter period than those already mentioned. For instance certain actions for injuries must be brought within one year of the time of the injury, a merchant's account must be sued on within two years.

If the party owing a debt against which the statute of limitations has already run, makes a promise to pay or makes a part payment on the same, the creditor can sue on the claim anytime before the statute of limitations has run again, counting from the time of the new promise or the part payment.

Checks. A check is the one form of a negotiable instrument that most often comes within the everyday experience of all of us. In the technical

---

18. Carroll's Ky. Stat., Sections 2505-2523

language of the law, a check is a bill of exchange. We are more or less familiar with the so-called "cold check" law and know that if a person with fraudulent intent draws a check on a bank where he has not sufficient funds to cover the check, he is punishable by fine or imprisonment, if he does not deposit the amount of the check within twenty days of the time he has notice of the dishonor of the check.[19] We are not all so familiar, however, with the fact that if he receives a check and holds it for more than twenty-four hours and the bank on which it is drawn fails, the loss will fall on him and not on the person drawing the check. Such is the law, and it behooves us cash such checks as are delivered to us promptly.

If a negotiable instrument is made payable to bearer, a person who purchases the same from a finder, or a thief even, for value and in good faith before the maturity of the instrument, may enforce it against the maker. A check is payable to bearer (1) when it is expressed to be so payable, (2) when it is payable to a person named therein or bearer, (3) when payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable, (4) when the name of the payee does not purport to be the name of any person, or (5) when the only or last endorsement is an endorsement in blank.[20]

Ordinarily negotiable instruments are made payable to some named person "or order." Such an instrument cannot be transferred without the order of this person being written on the instrument. This is accomplished by his writing his name and nothing more, across the back of the instrument. If he writes his name and nothing more, it is a blank endorsement. Such an endorsement makes the instrument payable to bearer, and it can thereafter be transferred simply by delivery of the instrument.

19. Carroll's Ky. Stat., Section 1213a
20. Ibid., Section 3720b-9

That means a finder could cash a check so indorsed. A blank endorsement carries with it an authorization to turn the blank endorsement into a special endorsement by writing above the signature of the indorser, "Pay to the order of --" (Naming the person who is the holder of the instrument). Thereafter it will be necessary for the holder to endorse the instrument in order to pass title to someone else. Suppose you receive a check which has been endorsed in blank, and you want to send it through the mails or want to fix it so that a finder or thief cannot cash it. All you have to do is to fill in the blank endorsement and make it payable to the person to whom you wish to send it. The only way a person can then cash it is by a forgery of the indorsee's name. In such case the loss will fall upon the person or bank cashing the check or note and not upon you.

Suppose the writer of a check so draws it that there are blank spaces so that an unscrupulous holder fills in the blank spaces and thereby increases the amount of the check and the bank cashes it for the increased amount. Do you lose or does the bank? Is this such negligence on your part that you will be liable to the bank for the amount it has lost through your negligence? The law varies in the different states. In Kentucky the loss will fall in such case on the bank.[21]

How is it when you give a check signed by you but with blanks for the person to whom it is given to fill out, possibly to fill in the exact amount when he finds out what it is; and he fills out the check for a larger amount. As between the original parties, the holder cannot hold you for the amount greater than agreed upon. However, if the note or check gets into the hands of a holder in due course, one who takes without knowledge of the fraud for value and before the note is due, he can hold you for the increased amount. Suppose you give a per-

21. Commercial Bank v. Arden & Fraley, 1917, 177 Ky. 520, 197 S. W. 951.

fectly good check and someone alters it? What are the rights of the parties? If the one making the alterations sues, he cannot recover. He is penalized for making the alterations. If the instrument gets into the hands of a bona fide holder, who is not a party to the alteration, he can recover on the instrument as it was originally made out, according to the original tenor of the instrument, as a lawyer would say.

Suppose the bank sends back your cancelled checks. Are you under a duty to the bank to look them over and see whether there have been any forgeries or alterations? In some states you are. In Kentucky you are not if no prejudice is caused the bank by your neglect.[22]

---

22. Maryland Casualty Co. v. Dickerson, 1926, 213 Ky. 305, 280 S. W. 1106.

AGENCY

We have all thought at times that it would be a very great convenience if we had several selves and could be at many different places at the same time and thus multiply our efforts and our rewards. Have we ever stopped to consider, however, that that is just what the law allows us to do when it allows us to act through agents? Agents are really other selves. We take the benefits of their labors and the law requires us to take the burdens that go with the relation as well. The word, agent, is derived from the Latin word, ago, that meant to do. An agent is then a doer, who is in the employ of another.

The law of agency covers a wide range of relationships, from that of master and servant to that of a principal and independent contractor. It deals with the rules governing your duties and liabilities resulting from the employment of a chauffeur for your automobile; your relationship with the real estate agents who rent your apartment houses and turn over the proceeds from the rent to you; and your dealings with the construction company with whom you contract for the erection of an office building on Main Street.

While the term agent is used in a broad sense to include servants, it is used in a narrower sense as when we say an agent is given discretion in acting for his principal and a servant is not. A servant represents his master in the performance of ministerial acts or services. He does not make new contracts for the master; the agent does.

The relation of principal and agent arises by contract. Often the contract is implied, not necessarily expressed. Compensation is not necessary, although it usually attends the relationship. A son might act for his father as agent and not receive any pay for so acting.

Who May Be an Agent? Most any one can act as

an agent for another. There is an old South Carolina case where it was held that a slave might act as an agent for his master. The slave was in charge of a river boat and had taken on a shipment of cotton, which was destroyed before reaching its destination. The master attempted to show that the slave could not act as agent and that the cotton had, therefore, never come into the possession of the master and that he could not be held for its value. A common carrier, that is a railroad or steamboat owner, you will recall, is liable for the loss of goods given into his charge for the purpose of carriage whether it occurs through his fault or not. He is an insurer of the goods put into his possession. In another case, it was held that a minor son could be an agent for his father, a wife can act as agent for her husband, and conversely the husband may act as agent for the wife. Of course, it does not follow that because a wife or minor child can be an agent, that they can appoint agents in all cases to act for them. A married woman, under many of the modern Married Women's Acts, cannot give a power of attorney to another to convey her real estate. Under some of the acts this is due to the fact that the statutes require that she shall be examined apart from her husband by a justice to determine whether the execution of the deed is her free and independent act. She certainly cannot give such a power in this state unless the husband joins with her in giving this power. Nor can a minor child give a power of attorney, that is a power to act as agent, to convey his orher real estate.

If a person does something in my presence at my direction, as where I tell you to sign the paper for me, it is not a case of agency. There the person signing the paper for me is not an agent by an anenuensis, sort of an extension of my own arm performing the act, an automaton.

To What Extent Is a Principal Liable For His Agent's Torts? A tort is a wrong or injury done

another for which the law will give compensation to the injured person. There was a time when the master was not held liable for the tort of his servant unless he actually authorized the very act which led to the injury. It was very early decided in the English law that where your servant carelessly drove your horse in such a way as to cause it to run into and injure my horse, I could sue you, declaring the injury to be due to your act.[1] But the early law held that if the servant wilfully and maliciously drove your horse into mine and injured it, I could not hold you liable.[2] If he drove it negligently, you were liable; but if he drove it wilfully, you were not. This was equivalent to saying that the servant might lift himself out of your business by wilfully doing the act. This test was finally abandoned and that of whether the servant was acting within the scope of his employment at the time was substituted for it. The test became, then, whether the servant was furthering the master's business at the time he caused the injury. Thus where the defendant's railway conductor wilfully stopped the train and made the passengers spend the night in the cars and as a result the plaintiff's health was injured because of the cold, it was held that the defendant was liable.[3] To be sure, there was a contractual relation there, and the defendant was a common carrier. Although the common carrier is an insurer of the goods delivered to it for transporting, it is not an insurer of the safety of its passengers. You must there prove that the carrier was at fault in some way. Parenthetically it is to be observed that if you take your dog and also your wife down to the railway depot and put them both on the same train and it is wrecked through no fault of the railroad company, the company will be liable for the injury to your dog but not for the injury caused your wife.

---

1. Bruckner v. Fremont, 1796, K.B. 6 T. R. 659.
2. Mc anus v. Crickett, 1800, K. B., 1 East. 106
3. Weed v. Panama Ry. Co., 1858, 17 N. Y. 362

If the agent is on a frolic of his own, that is doing something for himself and not furthering the master's business, at the time he causes injury to a third person, we have seen that the principal is not liable; but it is not always so easy to tell whether he is on his own business and not that of the master. For instance a contractor intrusted a horse and cart to a servant who, contrary to orders, drove the horse to his home at noon and left the horse in the street while he ate his own dinner. The horse ran away and injured the plaintiff. The man was both eating his dinner and taking care of the horse, and the employer was held liable.[4] There is another case that arose in Illinois in the good old horse and buggy days. The defendant's engineer caused steam to escape as the plaintiff was driving his horse across the tracks. This caused the horse to run away and injure the plaintiff. The court properly refused to charge the jury that if the engineer acted wilfully in causing the steam to escape when he did, the plaintiff could not recover. A finding for the plaintiff was sustained.[5] It was the engineer's duty to see that the locomotive, which was a dangerous machine entrusted to his care, did not harm. Suppose you have the case where an employee of a railroad takes one of the torpedoes used for signalling on-coming trains, and uses it in a practical joke on a friend. Should the railroad be liable for the injury caused there? It seems not as that clearly seems to be a case of the employee's being on a frolic-of-his-own. A typical case of the servant's being outside the master's business when he causes an injury is where the man was sent by the master to deliver a cask of wine. On his way home he turned off his route to get a cask of wine for a fellow servant. While he was driving off his course, he ran over a small child.

---

4. Whatman v. Pearson, 1868, L.R. 3 C.P. 422
5. Toledo & Wabash R.R. Co. v. Harmon, 1868, 47 Ill. 298

It was held that the master was not liable, as the injury was not caused while the servant was acting within the scope of his employment.[6] The tendency is more and more to hold the master in such cases. A common case of the employer being held liable for an act of the employee is where the employee is a salesman or a floorwalker in a store and the employee has a person suspected of shoplifting arrested. Most large department stores and most of the five-and-ten cent stores carry insurance to protect themselves in just such cases. Another case of the over zealous employee is that of the hired man who in driving the neighbor's cows out of his employer's corn field, hurls a stone and kills one, and also the case where in leading the colt to water, he allows a small boy to ride the colt and the boy is thrown and injured. In the former case the employer is held liable, but in the latter case he is not.[7]

"The Family Purpose Doctrine." Closely allied with the cases we have been considering is the so-called family purpose doctrine which prevails in a few states and is firmly established in the state of Kentucky. Under this doctrine the head of a family is made answerable for the damage caused by any member of the family while operating the family auto. It makes no difference that the son has taken the car without the father's permission, the father will be held accountable for the injury the son may inflict while he has the car. In other words, the frolic-of-his-own doctrine does not apply when it comes to the use of the family car. This doctrine probably had its origin in the assumption by the court that the automobile was a dangerous instrument and therefore anyone who put one into the hands of a member of his family should be answerable for the injury inflicted on a third person. The courts, however, have

---

6. Story v. Ashton, 1869, 4 Q. B. 476.
7. Evans v. Davidson, 1880, 53 Md. 245; Bowles v. O'Connell, 1894, 162 Mass. 319, 38 N. E. 498.

since repudiated that basis. One court worked out the proposition that it was part of the duty of the father to furnish amusement for his son and in trusting an automobile to the son, he was discharging this duty. If an injury occurred while the son was driving the car for his own amusement, he was engaged in performing a duty of the father and was therefore, his agent, and the father was responsible for the damage done. It is suggested then that since the car is purchased for the purpose of giving the family pleasure and comfort, the father is responsible for any injury caused while it is being operated for that purpose.[8]

Can an Agent Bind the Principal by Contract? Agents can bind their principals by contract under some circumstances. If a man makes you manager of his store, there are certain powers that go with the business which you as agent may exercise and in so doing bind your principal. If he says he will not allow you certain powers which are essential to the conducting of the business, he is contradicting himself, and it becomes a question whether you are an agent or not. If it is necessary to the business that you hire clerks, you have that power. He may give you specific instructions which are limitations on your power as agent. If the third person dealing with you does not know of the limit s on your power, and the contract he makes with you is one that agents ordinarily make, he will get a good contract that will bind the principal in spite of the specific instructions. You may have a general power to sell, but you may be told that you must not sell for less than a certain figure. The third person, not knowing of the limits, will get a good contract.

If the contract, the agent makes, is not within

---

8. Sampson, Liability of the Owner of an Automobile etc., 14 Ky. Law Journal, 201.

the scope of the business, such as is usually made in such a business, the third person will not get a contract that will bind the principal. For instance A brought a quantity of flour from B's agents to be shipped from Massachusetts to California. The agent gave a warranty that the flour would keep sweet during the voyage. The agent had never been given authority to make such a warranty, and he did not tell the buyer that he had such an authority. He received no higher price for the flour because of the warranty. It was held that the principal was not bound. It was customary in that business or locality to give such a warranty.[9]

From these cases it can be seen that there is no doctrine of frolic-of-his-own when it comes to contracts. It is supplanted by the doctrine that if the third person knows that the agent is exceeding his authority, the third person does not get a good contract. If he knows there is an over-stepping of authority by the agent, he cannot profit by it. The reason why there is no doctrine of frolic-of-his-own when it comes to contracts if that the third person and agent must work together in making the contract.

Take the case of an agent for an insurance company. The policy contains a statement to the effect that no one shall have power to waive any of the provisions in the policy. One of the provisions is that in case of loss by fire the insured shall report the loss to the company within a certain time. The agent tells you, "That is all right. They never pay any attention to that requirement." You rely on his statement and do not make the report as required. The company sets up the omission in defense to your suit for the amount of the loss. It is a good defense. In this case, the contract itself contains a statement of the limitation of the agent's authority. You cannot recover.[10] This shows that it is a

9. Upton v. Suffolk Co. Mills, 1853, 11 Cush. Mass. 586
10. Quinlan v. Providence Washington Ins. Co., 1892, 133 N. Y. 356, 31 N. E. 31.

wise thing to embody the limitations of the agent's authority in the written contract.

Is the Principal Liable For the Fraudulent Misrepresentations of the Agent? Suppose you instruct your agent to find a tenant for your house on Main Street. A prospective tenant asks the agent if there are any objectionable features about the house. The agent replies that there are none. As a matter of fact the house next door is a notorious gambling den and that fact was well known to the agent. The prospective tenant refuses to go on with the contract he signed and you sue him. He sets up the fradulent misrepresentation of the agent by way of defense to your suit. Are you responsible for the deceit or misrepresentation of the agent? You are. He wins.[11] If you take the benefits of the contract, you will have to take the burdens too. If the act is within the scope of the agent's employment, the third person profits.

Suppose the agent commits a fraud which is a criminal matter. Will the principal be liable there, too? When it comes to criminal matters, the principal is not as a general rule liable for the agent's crimes. The agent ought not to commit a crime. There are certain crimes, however, public torts and public nuisances where the principal may be liable. Suppose the agent runs a newspaper for his principal and he publishes an article that is a criminal libel. The principal may be held as he should have taken precautions to prevent its publication. There are crimes, too, where no criminal intent is necessary, such as the sale of food in violation of the pure food acts. The principal may be held; or he may be held for an illegal sale of intoxicating liquor. In such cases the statutes under which the prosecution is being made should contain language that clearly shows that the principal is liable for the acts of his agent in such cases.

---

11. Cornfoot v. Fawke, 1840, Exch., 6 M. & W. 358.

Can Admissions of the Agent by Used Against the Principal? Suppose that a policeman arrests your driver for running into a pedestrian at the crossing. The driver, when asked why he did not stop, says, "The brakes wouldn't hold. I have been telling the boss for a month to get them fixed." Can the policeman go on the witness stand, when you are sued and testify that the driver told him that? The driver was trying to excuse himself at the time. An early case held it inadmissible evidence.[12] Suppose that a letter with such a statement had been written to the insurance company that covered the risk. If the opposing lawyer could get hold of it, he might use it. Suppose it is made to a newspaper reporter. If should not be admissible there. It is not part of the agent's duty to make such an admission. If you find it made in the course of the agent's duty, it can be used. Another case is where it is part of the res gestae, that is where part of the circumstance that brought about the injury, it may go in against you. If it came out of the agent's mouth spontaneously, it could be used. It is there, part of what happened.

Is the Agent Ever Liable to Third Persons? If the agent injures someone during the discharge of his duty as agent, and he was negligent at the time, the injured party may hold him personally liable. He must act. If he does nothing, his only liability there is to the principal. Suppose it is his duty to close any gate he finds open on your farm. He sees a gate open but neglects to close it. The neighbor's horses pass through the opening and on to the railroad track where they are injured. We will also assume that you are under a duty to your neighbor to keep his gate closed. The neighbor cannot recover from the agent there. The agent owed him no duty. He did owe a duty to you to close the gate, however.[13]

---

12. Luby v. Hudson River Ry., Co., 1858, 17 N.Y. 131.

13. Horner v. Lawrence, 1874, 37 N. J. L. 46.

Is the Agent Liable if he Makes an Unathorized Contract? The agent cannot be held liable on a contract he purports to make with a third person, because the third person knows that the contract is not being made with the agent as principal. He may be liable for deceit, or negligence, or on an implied warranty of his authority. The only way an agent can escape liability in such a case is to put the other party in possession of all the facts he has himself.

What are the Rights of the Parties Where the Fact that There is a Principal is Unknown to the Third Party? If the agent purports to make a contract with the third party in his own right, then the third party may hold him on the contract, and, of course the agent may hold the third party. Now suppose that the third party discovers that there is really a principal in the case. May he sue him and may the undisclosed principal sue the third party? It is clearly the law that the principal may take advantage of any contract the agent made, and he may sue the third party, although the third party did not know that there was a principal when he made the contract. It follows, of course, that the third party may hold the principal when he discovers that there is one. To be sure he thought that he was only getting a contract with the agent. He is in luck as he may also hold the principal. If the third party had a claim against the agent at the time he made the contract, he may use it against the principal when the principal sues him on the contract?

Reimbursement or Indemnity. Suppose the agent suffers a loss or is put to expense because of the agency. Can he hold the principal for any outlay he has made because of the agency? If the loss is not due to the agent's fault, he is entitled to recover the amount from the principal. The principal takes the benefits of the relationship, and he must bear the burdens, as we saw at the outset. Suppose that the agent acts for the principal in

executing certain wagers, and he suffers a loss. Is the principal liable there? The transaction being illegal, the agent could not maintain a suit even against the principal.

Suppose now that the servant is injured by the act of a fellow servant. At common law he is not allowed to hold the master liable there. The early judges thought that there was too great a chance of the two servants plotting against the master in such a case. Today this is taken care of by the employer's liability acts. The employee will get the amount fixed in the statute for an injury such as he has suffered. To offset the severity of the fellow-servant doctrine the old law developed the vice-principal rule. If the injury were due to one who stood in the place of the principal, as an overseer or boss, then the fellow-servant rule did not apply and the master would be liable. That rule was limited in turn by the doctrine of assumption of risk. If the employee countinued to work on a defective machine, he was said to have assumed the risk and the employer would not be liable for injury in that case. The modern statutes have taken care of these situations today.

Agent's Duty to the Principal. The agent owed the duty to be obedient, diligent, and skilled. The duty of lavalty was very important. A man cannot do business with licensed spies. Loyalty is in the nature of the agency. He cannot make lists of his employer's customers and give them to a rival nor can he take them away with him when he leaves the employment. He cannot take presents and fees on the side from those with whom he is dealing in the principal's business. As a matter of law the principal is entitled to all such presents or tips the agent receives during the course of the business. This principal has been made use of in the past to make corrupt city officials disgorge bribes that they have received during the term of their office.

How May the Agency be Terminated? The agency may come to an end under the stipulations of the

contract that created it. If there is no time set in the contract of employment, then it may be revoked. If the agent has been dealing with third persons, there is a burden on the principal to see that such persons receive notice of the revocation. Otherwise, he will be held liable on contracts the agent makes with such persons after the termination of the agency.[14] The agency may also be terminated by the death of either party.

Ratification. Finally, it should be recalled that a person may attempt to act as your agent without having any authority from you. If the contract or subjct matter of the attempted agency is not to your advantage, of course you do not have to assume any liability, provided you do not try to take the benefits. It may be that the contract made would be highly advantageous to you. You may ratify the act, and it will have the effect of making the agency relate back to the time of the attempted exercise of authority by the would-be agent. If the third person withdraws before the ratification, then it will be too late to ratify.

14. Robertson v. Cloud. 1872. 47 Miss. 208

The word, tort, comes from a French term meaning to twist, a bending; hence a wrong. In our law it is confined to those cases where the defendant's liability is based upon his fault. It is an injury or wrong done another, either intentionally or negligently, for which the law will give damages, that is money compensation. Under this term is grouped a very diverse collection of private wrongs. Among the better known sub-divisions of torts we find libel and slander, assault and battery, false imprisonment, malicious prosecution, fraud, negligence, right of privacy, nuisance, interference with advantageous relations, and injuries done to property, either by animals you may own or by your carelessly setting fire by dropping a lighted cigarette. From these different kinds of torts one might infer that a tort is a crime against an individual, and that is just about what it is. In fact one act maybe both a tort and give rise to a claim for damages and at the same time be a crime against the public, punishable by imprisonment. If A assaults B on the public street, B may sue for damages and A may also be prosecuted by the commonwealth's attorney for the crime of assault and battery.

Libel and Slander. If one injures another's reputation by a defamatory statement the law will hold him responsible for the damage done. If it is oral defamation, it is slander. If it is written, it is libel. In the case of slander unless the words spoken come within one of the three clearly defined classes where the mere speaking the words to another makes the speaker liable, special damages must be shown in order to recover. Statements in regard to another which impute to him the commission of a crime punishable by imprisonment, those which impute a loathsome disease to another, and those which disparage one in his trade or profes-

sion are sufficient to make the speaker liable without showing that the plaintiff suffered any speical damage. Damage is presumed in such a case.

Defamatory language, either spoken or written, however, is not actionable unless there is publication. They must be spoken to or written to someone other than the person who is defamed. It is not enough that they are spoken in a public place, as on the street, unless it is shown that a third person heard them.[1] Suppose that a man dictates a letter containing libelous matter to his stenographer. Would that be publication? That has generally been held to be publication. Is it slander or libel in such a case? There has been a division of authority on that point. Some have said that it is slander since it is spoken to the stenographer; others that is is a written defamation since contained in a letter.[2] Suppose a man writes with his own hand a letter containing libelous statements and the person receiving the letter shows it to a third person. He cannot maintain an action for libel there as the publication was his own fault, not that of the writer of the letter. Where a man told his wife that he should not have told her about his neighbor, the court in California held that there was no liability as there was no publication.[3] Evidently the court did not take a practical view of the matter. Where the communication was to a partner in business, the court held that it was privileged and there was no liability.[4] Where a letter containing libelous statements was sent to a business man and his clerk opened the letter and read it, it seemed to be a question to go to the jury as to whether the writer knew or should have known that it would be so opened, whether he expected it to be so read; and where the letter was written to an illiterate man and he had

1. Sheffield v. Van Deusen, 1859, 13 Gray (Mass.)304
2. 15 Harvard Law Review, 230
3. Sesler v. Montgomery, 1889, 78 Cal. 486, 21 Pac. 185
4. 50 New York Law Journal, 406

someone read it for him, there was publication.[5]

As one or two of the cases already referred to show, statements that otherwise would be actionable, may be privileges. A common illustration is that of a letter written by a former employer in regard to an employee where a prospective employer has asked for information about the employee's ability or trustworthiness. Persons who present themselves as candidates for public office must subject themselves to attacks that they would not have to put up with were they not in public life. If one is tried in court, and the newspaper reports are fair, the publication is privileged. The mere fact that a person says that he heard so and so say such and such a thing, does not bring him within the privileged class. A person may be held liable for repeating a defamatory statement. Truth of the statement is generally a defense to a suit for slander, not always in the case of libel. It depends upon the law of the state where the suit is brought.

Assault and Battery. An assault may be briefly defined as intentionally putting one in fear of immediate bodily harm and battery as intentional bodily contact resulting in damage to the plaintiff. These are not technically correct definitions, but they serve the purpose of giving an idea of what a lawyer means when he speaks of assault and battery. An early English case laid down the following propositions which will help to make these definitions clearer: (1) The least touch of another in anger is battery; (2) If one touches the other without any violence or design, there is no battery; and (3) If one uses violence or rudeness in passing another and touches the other, there is a battery.[6] In another old English case, the defendant pleaded to a charge of battery that his

5. Allen v. Wortham, 1890, 89 Ky. 485, 13 S.W. 73
6. Cole v. Turner, 6 Mod. Rep. 149.

horse ran away with him and that he called to the plaintiff and others who were standing in the way, to take care or his horse would run over him. It was held that there was no battery.[7] Again where a policeman obstructed the entrance of the plaintiff to a room, it was held no battery; and there was no battery where a man touched another to call his attention to something. Where an officer at parade time said to a private, "If it were not parade, I would hit you,", there was no assault as there was no threat of immediate bodily harm. Where one rushed towards another with intent to pull him out of his chair but was stopped by bystanders, there was an assault. Also where one seized an unloaded gun and snapped it at the other, there was an assault. Inflicting indignities on another does not constitute assault as where a landlord, in order to induce the plaintiff to leave a house, had the servants remove the furniture except the bed on which the plaintiff was lying, burst open a door that was locked, removed windows, prevented food from being carried to plaintiff, had servants sleep in the house nights, and finally brought bloodhounds to the house; it was held there was no assault.[8] Assault and battery cases often grow out of the exercise of some legal right. We may attempt to put an intruder out of our house, which we may have a right to do under the circumstances, but he is very apt to claim that we used excessive force in do doing and sue for assault and battery. Railroads are often the victims of such suits where conductors have removed obnoxious persons from their trains.

False Imprisonment. To constitute false imprisonment there must be unlawful restraint of motion in every direction, within some limits de-

---

7. Gibbons v. Pepper, 1 Lord Raymond, 38.
8. Stearns and Wife v. Sampson, 1871, 59. Me.568 .

fined by the will of another. Such restraining may be imposed either by the actual use of physical force or material substance or by the submission with the threatened use of force when there is reasonable belief that use of force can and will be immediately attempted if there is not submission. But there is no imprisonment where the mode of egress is reasonably apparent and safe which can be used by the average man without applying physical force to the place or means of confinement. Mere words alone do not constitute false arrest. For instance, if a man calls up by telephone and falsely says that he has a process to serve on the listener and asks him if he submits to arrest and the man says that he does, these facts would not support an action for false arrest.

There is an interesting case where a man employed detectives to constantly guard a man for a period of two weeks. The plaintiff was not permitted to go where he pleased, and he was subjected to repeated examinations. He was given to understand that if he attempted to assert his liberty he would be arrested at once. The court found that he was deprived of all real liberty and sustained a verdict for him.[9] Another interesting case is where the defendant closed up a part of the highway. The plaintiff wished to go that way but was prevented by the obstruction placed there by the defendant. Plaintiff was not molested by defendant and was told that he might go another way. This was not sufficient to maintain an action for false imprisonment. Generally speaking, then, whenever one causes the detention of another illegally, without legal process, he is liable in damages to the injured party.

Malicious Prosecution. To win in an action for malicious prosecution one must show that there was

9. Frotheringham v. Adams Express Co., 1888, 36 Fed. 252

a criminal prosecution begun at the instigation of the defendant, that the process terminated, that it terminated favorably to the plaintiff, except in ex parte proceedings, that there was want of probable cause, and that there was malice on the part of the defendant. There is probable cause where there is a reasonable ground of suspicion supported by circumstances that will warrant a reasonable man in the belief that the plaintiff is guilty of the offense for which he is prosecuted, the defendant acted in good faith. That the defendant acted upon the advice of a lawyer should give him a complete defense. If the plaintiff is bound over by the grand jury, the defendant is absolved from liability. Of course the only safe rule in such cases is to take no steps leading to the arrest of another without first securing the advice of a competent lawyer.

Fraud. The most common tort committed in the commercial world is fraud or deceit as it is also called. To hold a defendant in deceit the plaintiff must establish that the defendant made a false representation to him, knowing that it was false, with the intention that the plaintiff should act upon the representation, that the plaintiff should be damaged as a result of his acting upon the statement. Suppose that a man tells a prospective buyer that he believes that the oil stock he is trying to sell him is very valuable and will double in value within six months. In fact he believes no such thing. This is a fraud as it is an untrue statement as to the state of his mind. Expressions of value, however, would not be actionable nor would a mere expression of opinion, honestly made.

Suppose that A tells B that the president of the X bank has embezzled bank funds, thereby hoping to induce B to vote against the president of the bank in his race for Congress. B rushes out and sells stock he has in the X bank and thereby suffers loss. Can he hold A? Not unless A as a reasonable man should have known that B would have acted as he did.

If he intended him to so act, then he would be liable. Suppose that C is standing nearby and overhears the conversation. He immediately sells stock he has in the X bank. Can he hold A? Probably not as A did not intend C to act upon his representation.

Negligence. A very large percentage of the cases under the heading of torts is to be found under the title of negligence. Popularly speaking, negligence is carelessness. Wherever we owe to another the duty not to injure him through our carelessness and we fail in that duty, he has a cause of action against us to the full extent of his injury. His injury must be due to our neglect. His own fault must not contribute in bringing about the damage. In the language of lawyers, he must not be guilty of contributory negligence. Suppose, for instance, he is driving on the wrong side of the road and we run into him. If his being on the wrong side of the road was in any way the cause of his injury, of course, it would not be fair to make us pay for it. Or if he is running by a red stop light when we run into him, he should not recover although we were exceeding the speed law at the time. In popular terms, if both are at fault neither can recover. It behooves us to remember, then, when we drive where we should not, or drive faster than the ordinance allows, or park where we are not supposed to park, that if another were to run into us at that moment, we should probably be out of luck, as we say.

There must be a duty resting on the defendant. In the case of the Samaritan and the Levite we read about in the Bible, where the Levite passed by on the other side and rendered no help to the man who fell among thieves, there was no legal duty resting on him to render the needed aid. Suppose a man comes to you and says that unless you give him bread he will die; or a man says that unless you give him five hundred dollars so that he can go to California for the winter, he will not live. If you refuse the

needed help in either case, you will not be liable if sued at law for the failure to give help. If you find a man lying wounded in the snow and take off his overcoat to examine him and then you decide that you cannot help him and you go away without putting the coat back on him, you should be held liable. There you have undertaken to act and you must, at least, leave him in as good condition as you found him. There is a Minnesota case where a conductor and brakeman helped an old man off the train and part way up the station steps where they left him. He was injured there. The railroad was held liable. They should have seen him to a place of safety since they undertook to care for him. Where a doctor starts to help a sick person and then stops coming, he should be liable for the consequences, as after he had undertaken the job of caring for the sick person he should not stop without giving proper notice so that another helper could be secured.

In these negligent cases we hold a man to the standard of the ordinary prudent man. Suppose a blind man is knocked down and run over by the defendant's horses that have run away through the defendant's fault. Is the blind man guilty of contributory negligence in being in the highway and therefore barred from a recovery? We hold the blind man to the standard of the ordinary blind man, and it has been held that it is not negligence as matter of law for a blind man to be in the highway.

Suppose you hire a taxi and the driver collides with a street car and that both the taxi driver and the motorman are guilty of negligence. Can the street car company set up the negligence of the taxi driver as a defense to your suit against it for damages? You did not have control over the taxi driver and should not be barred by his contributory negligence. Suppose you are on the street and a friend asks you to ride in his automobile. An accident happens and you sue the third person for the injuries you received. He sets up contributory negligence. Are you barred by the negligence of your friend? If your

friend were a very careless driver and you knew that fact; then it should be assumed that you took the risk. Can the third person sue you, who are the guest of the careless driver? As you do not have control over your friend's actions, you should not be held. There is a Minnesota case where several young men hired a team and took their girl friends for a ride. The driver was careless. One young man and one of the girls sued the third person who ran into them. The man was not allowed to recover as he was one of the principals of the joint enterprise but the girl, who was a guest, was allowed to recover against the third party.[10] In another Minnesota case involving a picnic party, the young men hired the team and the women supplied the lunch, a young lady was injured. It was held that she could recover as she had no control over the management of the team.[11] Suppose that a wife is injured while riding with her husband. The husband is guilty of contributory negligence. Should the wife be barred? By the weight or authority she is not.

Right of Privacy. An interesting phase of the law of torts that has been developed in fairly recent years is that of allowing damages where a person's right of privacy has been interfered with. This subject raises the question whether another can take your picture or name and use it on a poster for the purpose of advertising. One of the first cases to come before the courts arose in New York. The defendant there used the plaintiff's picture to advertise the "Flour of the Family" brand of flour. The court held no right of the plaintiff had been interfered with and did not allow a recovery.[12]

---

10. Wosika v. St. Paul City Ry. Co., 1900, 80 Minn. 365 83 N.W. 386.
11. Koplitz v. City of St. Paul, 1902, 86 Minn. 373, 90 N.W. 794.
12. Roberson v. Rochester Folding Box Co., 1902, 171 N. Y. 538, 64 N. E. 442.

Statutes thereafter were passed protecting a person against the use of his name and picture for advertising purposes, without his consent. A similar case arose in Kentucky seven years later, Foster-Milburn Co. v. Chinn.[13] In that case the defendant used the plaintiff's name in a recommendation for a patent medicine. The court instructed the jury that the plaintiff might recover because of a violation of his right of privacy. The Kentucky court has gone farther than any other court in protecting this right not to have one's private affairs drawn before the public gaze. The most recent case concerned a rather unusual way of collecting debts. A garage owner placed a large placard in his show window containing a statement that it would be removed when the plaintiff paid his bill. The court sustained a finding for the plaintiff.[14]

Nuisance. A nuisance "consists in disturbing one in the 'reasonable confortable use and enjoyment of his property,' or in the enjoyment and exercise of a common right."[15] Suppose that your neighbor permits trees to grow on his land so near your line that the branches overhang or the roots penetrate your soil so that several square yards of your garden spot are rendered useless to you. That is a nuisance maintained by him which you can sue him for or you may resort to self-help. If you decide to abate the nuisance yourself, you can climb onto your step-ladder with a saw or an axe in hand and cut the limbs off, being sure not to reach beyond the division line. You also may dig a trench on your land near the line and cut the roots of your neighbor's trees that extend into your soil. The same is true of his eaves which project over your land and cause you annoyance by dripping rain water on your walk. If

---

13. 1909, 134 Ky. 424, 120 S. W. 364.
14. Brent v. Morgan, 1927, 221 Ky. 765, 299 S.W. 967,
15. Burdick - Torts, 4th Ed. p. 483.

he illegally sells intoxicating liquors on his premises to the great annoyance of the neighborhood, you cannot there resort to self-help to abate the nuisance, but must call upon the public prosecutor for help. In this case you are dealing with a public nuisance. A nuisance may be both a public and a private nuisance. The liquor nuisance is an example of the former case and the case of the eaves projecting over your land is an example of the latter. A common form of nuisance is where a neighbor dams up a stream of water and causes the water to flow back onto your land, or he may cause unpleasant smells to be wafted across your land, or he may send loud and distressing noises over the division line between your land and his. The law gives you a remedy in all such cases. It will not allow you to resort to self-help in all cases and never where it is liable to cause a breach of the peace. Of course whether a thing is a nuisance or not depends upon the circumstances surrounding the particular case. What is a nuisance in one nieghborhood may not be in another. If you live in a manufacturing section, you may have to put up with inconveniences that you would not have to if you lived in an exclusive residential neighborhood. Not only is self-help allowed in some cases and an action for damages given, but the court may issue an injunction, that is an order that the nuisance shall cease. It is to be remembered, too, that if you sleep on your right to have the nuisance abated, your neighbor may acquire a right to continue the nuisance by the mere passing of time. The statute of limitation is said to run in such a case.

Interference with Advantageous Relations. If you interfere in the contractual relations between two parties and the result is a loss to one of them, he may hold you liable, that is if you induce another to break his contract with a third person, the third person can hold you accountable to the extent of his injury. It should make no difference whether you used force, fraud, or persuasion to bring about the

breach of contract. There are grounds of justification as where a physician tells one of the parties to a contract that it will be dangerous to his or her health if he or she goes on with the contract. Nor would a lawyer, who acts in good faith, be liable for advising his client not to go ahead with a certain contractual obligation. There is an old English case where the plaintiff sent ships to the African coast to trade with the natives. The defendants carried on a rival business, and when the natives approached the plaintiff's ships, the defendant's fired at their canoes and thus prevented them from trading with the plaintiff. The court allowed the plaintiff to maintain an action at law against the defendants.[16] There was no contract, to be sure, in this case, but the defendants did interfere with or prevent plaintiff in his right of expectancy.

However, if your rival for the hand of your sweetheart has already exacted a promise from her that she will marry him, you need not be deterred from pressing your suit for her hand and inducing her to change her mind and marry you; for this doctrine does not seem to have been applied to the case of a contract to marry.

Injuries Done to Property. Finally there are the cases of injuries done to real property. It is, perhaps, almost a common place thing to say that if your horses or cattle get over onto your neighbor's land you may have to answer for the damage they do. At common law if your cat or dog ran over his land, he had no right of action against you. The law took notice that the damages in such a case are usually of a very minor nature. Suppose that his chickens insist upon scratching up your flower beds each time you carefully lay them out. You have no right to shoot them. You might sue your neighbor, but there the cost is so great that it would be about as much a punishment for you as for him. About the only

16. Tarlton v. M'Gawley, 1804, Peak 205.

thing you can do in such a case is to learn to enjoy driving them out of your garden.

If your neighbor were to keep wild animals on his land and they should get away and do damage either to your land or your person, he should be held liable, for he keeps such things at his peril. If he has a cross dog, you must remember that the law gave a dog one bite. After that the owner, having been duly appraised of the fact, must pay for any further bites the dog takes and under most statutes pay double or treble the value of the same.

CRIMINAL LAW

A crime has been defined by Blackstone as " an act committed or omitted in violation of a public law, either forbidding or commanding it."[1] Criminal cases are between the offender and the state, not, as in civil cases, between two individuals. One offense may give rise to both a criminal and a civil action. A man who assaults another in a public place may be subjected to both a criminal prosecution by the commonwealth's attorney and be sentenced to pay a fine or serve a term in jail; and to civil suit brought by the man assaulted, in which a judgment for money damages may be given against him in favor of the injured plaintiff.

Most crimes require two things:, an act and a criminal intent on the part of the actor. The law is interested in punishing persons with criminal minds. This criminal intent is an element in all major crimes, felonies. It is not a necessary element in minor offenses and very often not in statutory wrongs, as for instance where a statute forbids the sale of milk that does not possess a certain percent of butter fat. There it is no defense that you did not know you were selling milk below the standard required. It is no excuse that your intentions were good. The state does not want such milk put upon the market. It is because the law requires that the person prosecuted for a crime shall have been found to have had a criminal intent at the time he committed the offense for which he is being punished, that insanity is a complete defense. An insane person, not being able to recognize the nature of what he is doing cannot commit a criminal act.

Early Law as to Married Women. Under the

---

1. 4 Bl. Com. 15

common law a married woman was presumed to be under the control and coercion of her husband and was not held responsible for crimes committed in his presence. Where the husband was not present, there was no presumption of coercion, but it was held that she might be in his presence although she was not within his sight nor within immediate proximity to him.[2] It was also held that she could not steal from him as she could not have possession of property away from her husband. Neither could a person to whom she gave property belonging to her husband be guilty of larceny unless she gave it to one who was an adulterer as in that case the third person could not presume that the wife had her husband's consent to give away the property in question. It was also true under the old law the husband could not steal from the wife.

Under the Modern Law. With the passage of the so-called Married Women's Acts came a change of view in regard to a married woman's responsibility for crimes. The presumption of her acting under the coercion of her husband while in his presence no longer holds true. Today she can commit a crime in the presence of her husband.[3] There is no longer a presumption that she cannot. Since the Married Women's Acts give a wife property rights and generally allow her to hold property just as though she were unmarried, it seems clear that the husband can commit larceny of the wife's property, and it seems equally clear that the wife can steal from the husband although there does not seem to be much authority on the latter point.[4]

---

2. 4 Bl. Com. 15
3. King v. City of Owensboro, 1920, 187 Ky. 21, 218 S.W. 297; Twemy v. Commonwealth, 1925, 206 Ky. 522, 267 S. W. 1087; Anderson v. Commonwealth, 1925, 211 Ky. 726, 277 S. W. 1008.
4. May's Criminal Law, section 287.

Suppose that a husband assaults and beats his wife or that the wife beats up her husband. The courts do not in such case allow civil suits, but they do allow criminal proceedings against the guilty party. Of course there is another remedy in such cases, divorce. The old common law did grant a right to the husband to chastise his wife but that right has never been recognized as such in the state of Kentucky.

Parent and Child. Suppose that your child commits some act which is punishable under the laws of the state? Are you in any way answerable for it legally? You may be morrally, but not legally. It is the same whether your child damages your neighbor's property or assaults his person. You are not answerable for his torts. He is. Of course he may not now have anything that can be taken to satisfy a judgment against him. If he has not now, it does not follow that he may not have something later, in years to come. In such case the injured party may secure a judgment against him and then abide his time until a rich aunt leaves your son a fortune and then secure satisfaction of judgment out of it. If she outlives the time during which a judgment runs, the one having the judgment can sue on the judgment and secure a new judgment that will be good for another fifteen or twenty years, whichever the statute of limitation of the particular state allows. In Kentucky it is fifteen years. Of course if the young man has no qualms of conscience in the matter, he can avail himself of the bankruptcy act and wipe the judgment out at any time.

The parent of a child or children under sixteen years of age who deserts such child or children leaving them in destitute or indigent circumstances may be punished by confinement in the penitentiary for not less than one year and for not more than five years. Also a man who leaves his wife who is pregnant by him in a destitute condition is subject to

a like sentence.[5] And there is a converse proposition whereby children who are capable of supporting indigent parents and do not do so, may be subjected to punishment.[6] To convict under the first of these statutes, it is not enough to show that the child was abandoned. It is necessary to show that he was left in destitute and indigent circumstances. The fact that the child was taken care of by other relatives than the wife, does not give the parent a defense when prosecuted. If the wife supports the child out of her own property, a case is not made out against the father, but the fact that the parent is sick or has suffered business reverses, will give him a defense.[7] Nor is a father guilty under the statute where the child has been taken away from him and intrusted to its mother in a divorce proceeding.[9]

Juvenile Courts. As a result of Judge Lindsey's reforms in the manner of handling children brought before the court in Denver, juvenile courts have been established throughout this country. These courts are given exclusive jurisdiction over delinquent children. In this state the county court sits as a juvenile court and handles all such cases. Male children under seventeen years and female children under eighteen years of age are subject to the jurisdiction of the court. Trials are held from which the public is excluded. A jury may be had in a proper case. If a child within the prescribed age limit is arrested and brought before the regular criminal court, he is immediately turned over to the judge of the juvenile court. Probation officers are appointed to assist the judge in looking after the youths whose names appear on his docket. Offenders may be allowed to stay in their own homes if they

---

5. Carroll's Ky. Stat., section 331i-1.
6. Ibid., section 331f.
7. Webb v. Commonwealth, 1931, 237 Ky.141, 35 S.W.2d. 14.
8. Osborne v. Commonwealth, 1931, 241 Ky.345, 43 S.W. 2d.990.

are proper places, or they may be sent to detention schools.[9] If placed on probation, they may be required to report to the court from time to time to the probation officer.

A delinquent child is defined by the statute. It includes one under the specified age who has violated the law, or who is incorrigible, or who knowingly associates with thieves and immoral persons, or who patronizes saloons, gambling places and the like, or who conducts himself in a disorderly or indecent manner. Dependent and neglected children also come within the protection of this court.

Many cases have been before the Court of Appeals bearing on the jurisdiction of the court, especially touching upon the age limits. For instance a youth who is already seventeen years old is not within its jurisdiction. Since he has passed his seventeeh th birthday, he is over seventeen. An interesting case arose were a man and a boy, under seventeen years of age, were both convicted in the circuit court for murder. The boy's case had not been transferred to the circuit court by the judge of the county court. It was held that the judgment as to the boy was without jurisdiction.[10] It is safe to say that these juvenile courts are fully meeting the expectations of their promoters.

Statutory Crimes Against Women. There are certain statutes on our books designed for the protection of womanhood. The crime of rape is punishable by either confinement in the penitentiary for a long term of years or death, in the discretion of the jury.[11] The age of eighteen is fixed as age below which a female child cannot consent to carnal knowledge with one not her husband. It is punish-

9. Carroll's Ky. Stat., section 331e-1 et. seq.
10. Clark v. Commonwealth, 1921, 201 Ky. 261, 256 S. W. 398.
ections 1152-1155.

able by confinement in the penitentiary to abduct a girl under the age of fourteen, and it is likewise punishable to unlawfully detain any woman against her will with intent to marry her or to have carnal knowledge of her.[12] There is also an action allowing a parent an action for the seduction of a daughteer, without having to prove loss of services as was required under the common law.[13] One of the most effective weapons in the war against traffic in women has been and is the federal statute popularly known as the Mann Act or the White Slave Act.[14] Under this act punishment is meted out to anyone who transports a woman across a state line or in the District of Columbia for immoral purposes.

Criticism of Our Criminal Procedure. No part of our whole legal system has come under as great criticism in recent years as the enforcement of our criminal law. No section has been more closely studied of late than criminal procedure. It is said that in criminal prosecution we are still working with methods of the ox-cart age in this day of airplanes and automobiles. This is not so surprising when we realize that reforms in judicial methods naturally come slowly. Judges and lawyers as a rule are conservative. They believe in making haste slowly.

One of the most outspoken criticisms against criminal prosecutions one used to hear was of the law's delay. In some cases it might be years before the alleged criminal was brought to trial. When his did come up, it was often found that important witnesses for the state had either died or disappeared. We do not hear so much today about the law's delay. In murder cases today it is not unusual to find that the prisoner has been convited within a month or two of his crime. In cases where the prisoner has pleaded guilty, it may be only days before

12. Ibid., sections 1156, 1158
13. Ibid., section 2
14. 18 USCA, Section 398

he is sentenced. In a Michigan case a year ago or so, it was only two days after the crime that the criminal was on his way to state's prison under life sentence.

The technicalities of the law furnish the prosecutor with the greatest handicaps to successful prosecution in criminal cases. These have grown up during long years of legal battles, at a time when the advantages all lay with the king's prosecutor and at a time when the law exacted the severest punishment for its violation, at a time when in England there were well over a hundred offenses punishable by death. Stealing was so punishable. In one early case the prisoner was charged with stealing three pigs. The facts showed that the pigs had died of cholera and that the master had directed the prisoner to bury them. He did so and later dug up the carcasses and sold them to unsuspecting buyers. The judges held that when the pigs were once buried in the ground, they became real property and since under the law one could not steal real property, the prisoner was not guilty of the offense charged and was entitled to go free. That seems far away but the same principle has been invoked in fairly recent years. General Butler, one-time governor of Massachusetts, was called upon once to defend a man who had walked up the street late at night and collected several door keys absentminded householders had neglected to remove from their doors after letting themselves into their houses in the early hours of the morning. The charge here was stealing. The General had no difficulty in convincing the court that keys in doors attached to houses were real estate and not subject to larceny and that his client was entitled to go free. At the next meeting of the state legislature a law was passed making it a crime to appropriate to your own use certain things attached to the real property such as keys, blinds, and the like.

The thing that gives the prosecuting attorney the greatest difficulty, on account of technicalities, is the indictment. The Indictment is the formal charge set forth against the prisoner. It is drawn

by the prosecuting officer and must contain technical language to be upheld. These indictments are very long and very involved. It is very easy to omit something the court has held necessary to the charge. The indictment gives the prisoner an idea of what he must be ready to defend himself against. Of course it would be unfair to mislead him in any way. But after all is said, is it not sufficient if he is told that he is charge with murdering a certain person at a certain time and place? The short indictment that has been offered as a substitute for our old wordy one embodies just such a statement and no more.

A great deal of complaint has come from the conduct of juries in criminal cases. In criminal cases there must be a unanimous finding of guilt to hold the prisoner. In desperate cases it is often easy for agents of the defendant to reach one of the jurors by one means or another and induce him to hold out for acquittal. Then the quality of the men often selected for this service does not warrant the best results obtainable. Sometimes they are selected from the men loitering about the courthouse and who are glad to put in their time for the small amount paid for jurors. Possibly doing away with the requirement of unanimity for a verdict and allowing two-thirds or three-fourths to convict would go a great ways in improving the jury system. Also, it is needless to say, a more careful selection of the men to serve will add much in efficiency.

A great many lawyers have felt for a long time that the judge should be given more freedom in his charge to the jury at the end of the trial. In most jurisdictions he is allowed to charge only on points of law. If he could also sum up and charge on the facts presented by the evidence it would help the jury in arriving at a just verdict. His charge, which is customary today, that they must find that the prisoner is guilty beyond a reasonable doubt, causes many jurors trouble. It tends to confuse them and makes it exceedingly difficult to get convictions even in clear cases.

Experts used at trials come in for their fair

share of criticism, especially the insanity experts. Experts of very high standing are produced by the prosecution to show that the defendant is of normal mind and equally reliable experts are produced by the defence to show that he is not of sound mind. It has been suggested that the law provide some way whereby an impartial tribunal of experts shall pass upon the sanity or insanity of the prisoner. One authority would have an administrative board to pass upon insanity cases, this board to consist of the judge in the case, and certain experts. It is also suggested that the state or county employ experts to appear in such cases and give evidence as to the insanity of the defendant. Their position would not be so much as witnesses as judges, and they would speak from an impartial point of view. The problem is under study at the present time.

Then there is the "newspaper trial" which justly causes the most severe criticism. The publication before the trial of statements by the prosecuting officer of what he is going to show and statements so worded as to convey to the public in a subtle manner that the prisoner is guilty, render a fair and impartial trial of the case very difficult. When it comes to the actual trial and a Roman holiday is made of the occasion, as was done in the Hauptmann case, there is much that can be said in favor of restricting the freedom of the press in such cases.

Constructive Criticism. Some of the constructive criticisms for the improvement of our criminal procedure have already been suggested. There are many others being considered by legal scholars at the present time. For instance, today we hear much about the defense of an alibi, that is the defendant produces witnesses to prove that he was somewhere else at the time the crime was committed and could not possibly have been in the neighborhood at the time. It has been suggested that the law should require, where the defense of an alibi is to be used, that the defendant shall be required to give notice of the prosecution of such intent and the names of the witnesses

and that such notice shall be given a certain time before it is to be used or before the trial begins. The object of this provision is to give the prosecuting attorney time to investigate the credibility of the witnesses suggested, their connection with the defendant and the actual fact of such alibi. In answer to this provision, it is said that the prosecuting attorney generally knows when such witnesses are to be used under the present system and in cases of surprise, he can ask for a continuance of the case until he has had a chance to investigate.

Then in most states the attorney for the prosecution is not allowed to comment to the jury on the failure of the defendant to take the witness stand in his own defense. Very often, yes, as a general rule if the prosecution could cross-examine the defendant before the jury, the case against the accused would be very greatly strengthened. As it is, he cannot even call their attention to the fact that the defendant has not cared to testify in his own behalf. But it is also suggested here, too, no great hardship is done as a clever attorney can get the fact before the jury by inference. He can say to the jury; "If the defendant did as they suggest he did, where is their witness? Why did they not put a witness on the stand who knows about this?" The defendant is probably the only witness that could have testified to the particular fact.

A few states have already adopted the rule requiring notice in advance of the defense of alibi and a few allow the prosecuting attorney to comment upon the defendant's failure to take the witness stand in his own behalf.

A unidorm code for criminal procedure has been carefully drafted and is being studied in the different states with a view of adopting it in part or in whole. Under this code the state is at least put on equal footing with the defendant before the bar.

The Council of State Governments at a recent meeting in Chicago drafted legislation for adoption by the several states. Three different measures were

proposed. In the first place provision is made for state bureaus of criminal identification in every state in the Union. Fingerprints are to be made of all persons who obtain motor registration certificates and motor vehicle drivers' licenses. In the second place, it is proposed to grant power to the peace officers of one state to make arrests in another state in case of "hot" or "close" pursuit of a fugitive who seeks asylum across the border Line. As the law is today, it is possible for a criminal to take refuge beyond a state line when an officer is in pursuit and thus escape immediate arrest. The last proposition calls for a revision of the uniform extradition act, to simplify and expedite the recovery of fugitives who have fled from justice into another state.

From the amount of discussion and of writing that is now being devoted to the subject of enforcement of our criminal law, it is safe to perdict that we shall see very great progress in regard to it during the next few years.

CIVIL RIGHTS AND OBLIGATIONS

Women's civil rights are today co- extensive with those of men. With the coming of the privilege of voting came also the obligations that attend such a privilege. There came the right to hold public office, and the duty to serve on juries and the like. Not every man or woman living in the state is entitled to vote at elections, state or national. What are the qualifications to the exercise of the right to vote?

Voting. The qualifications for the right to vote are fixed by statute. In this state every person who is over twenty-one years of age, who has resided in the state one year, and in the county six months, and in the precinct where he is to vote sixty days preceding the election, is qualified to vote. There are certain exceptions, however, (1) persons convicted of treason, felony, bribery in an election and of certain misdemeanors to which the legislature has attached this penalty; (2)persons confined under judgment of court for some penal offense; and (3) idiots and insane persons are denied the right to vote.[1]

We speak of the right to vote as a privilege. Under a democratic form of government, it is really a duty. Various schemes have been suggested to compel qualified voters to discharge this duty. It has been suggested that those who do not punctiliously meet the obligation should be deprived of the right. It has also been suggested that fines should be imposed upon those who can and do not vote. In earlier days the privilege was confined to property owners. The interest at stake there does not seem so remote and it is urged in favor of this restriction that self-interest will prompt its wise use. In practice the matter is left to the voter's own conscience. It is a matter of educating the possessor of this privilege to the obligation the privilege imposes.

---

1. Carroll's Ky. Stat., sections 1439, 1596b-1

Holding Public Office. Both elective and appointive offices in this state, as in other states of the United States, are as open to women as they are to men. There are certain qualifications for the various offices that must be fulfilled, as where it is necessary that one shall have been a resident of the state for a certain number of years before he can be a candidate for the position. Women are late comers in the field of public officials. They are, however, holding many important positions in the public service in Kentucky. Throughout this country we find many women proving especially efficient in the administration of city affairs in the capacity of mayors. It is now the usual rather than the unusual thing to find them members of our legislative bodies, both federal and state.

In more than one state a woman has held the governor's chair. In this state the Constitution[2] provides that the governor shall be, at least, thirty years of age and shall have been a citizen and resident of Kentucky for at least six years preceding his election. There is no requirement as to sex. This is typical of the requirements laid down for the important places in our state government.

There are provisions in the Kentucky statutes against one person holding more than one office of an enumerated list of offices, at one time. These are termed incompatible offices. For example, a person cannot be at one and the same time a justice of the peace and sheriff, nor can he hold a municipal office and at the same time hold a county office.[3] A person filling a federal office, such as that of postmaster or employed as a letter carrier is incompetent to hold a seat in the state legislature.[4] Buying or selling a public office disqualifies one of holding such office and may subject him to a criminal prosecution.[5]

2. Section 72.
3. Ibid., section 3746.
4. Ibid., section 3745
5. Ibid., section 3740

Jury Service. Under our judicial system a man is entitled to be tried by a jury of his peers or to have his suits against parties obligated to him tried by a jury. The English common law system has always been strong for having questions of fact settled by juries. The questions of law governing a case are left to the court. If the judge presiding at the trial of a case errs in his interpretation of what the law is that governs the case, you can appeal your case to a higher court, but the question of fact as to just what did or did not actually happen is settled once for all by the jury drawn to try the case. The only way the trial judge can upset the finding of the jury in civil cases is to grant a new trial if application is made to him within the time allowed.

Under the laws of the state of Kentucky, women as well as men may have the privilege of serving on juries. The statute provides that the circuit judge of each county shall annually appoint "three intelligent and discreet housekeepers of the county over twenty-one years of age, resident in different portions of the county, and having no action in court requiring the intervention of a jury, as jury commissioners for a year, who shall be sworn in open court to discharge their duty."..... "They shall take the last assessor's book for the county and from it shall carefully select from the intelligent, sober, discreet, and impartial citizens, resident housekeepers in different portions of the county, over twenty-one years of age,"..... from one hundred and twenty-five to two thousand names according to the population of the county. The names of these persons selected are written on small pieces of paper and are deposited in a revolving drum or wheel provided for that purpose. This wheel is sealed and thoroughly shaken. Twenty-four names are then selected and persons whose names are so drawn are to serve as grand jurors. A grand jury is a body which passes upon evidence that the commonwealth's attorney

has in a criminal prosecution, to determine whether there is sufficient evidence to warrant trying the alleged criminal before a jury and judge. The names of persons so drawn are then sent to the criminal division of the circuit court.

After the drawing of the grand jury, the barrel is again locked and shaken and then not less than thirty and not more than thirty-six names are drawn for the petit jury. The petit jury is the body before which the law suit or criminal case is tried in court. Twelve are drawn from this list of thirty-six when the case comes up for trial. These men are the actual judges of the facts in any case.[6]

The quality of the men serving on our juries has long been the subject of criticism. It is regarded by many as the weak point in our judicial system. Many drawn have asked to be excused from serving on one ground or another, but really because they have cared more for their business or profession than they have for the public good, forgetting that a democratic form of government is a partnership affair in which those who hope to benefit therefrom must contribute not only money in the form of taxes but time and thought if it is to be carried on for the highest good of each and every member of the firm. Women under our statute are privileged to be excused from jury service.[7] This is probably the reason why as we go into our court rooms we see few if any women in the jury box. There is no real reason why this should be so. There should be some way of seeing to it that more slips with their names are put in the barrel from which the names of the jurors are drawn. Jury service may seem an irksome and unprofitable task. As a matter of fact, it is really far from either. One who serves a term as juror with an open mind can learn more about human nature during his service than he can in any other way in the same length of time. Then, too, it is for his own interest to see to it that we have an efficient jury system as he

6. Ibid., section 2241.
7. Ibid., section 2281-1

never knows how soon he may be forced to resort to it to enforce legal rights that may involve large sums of money. Then there is the long range view to be considered. It is just this neglect or avoiding civic responsibility that has been the cause of the downfall of popular governments in the past.

Serving as Witness. Not so far removed from the duty and privilege to serve as a juror is the obligation to aid in the trial of a case as a witness when we have knowledge of facts that bear upon the case before the court. The natural tendency when we have seen an accident, is to get away before any one can take our names as prospective witnesses. If we have a sincere desire to see justice done in a case, we should not only give our names as witnesses but should assist in getting the names of the other persons who were present at the time. Justice cannot very well be done in a case unless the best evidence obtainable is presented to the court. We may feel that it is an unpleasant experience in bearing witness at a trial and that the cross-examination we are subjected to is even insulting. The person who tells a traightforward story has nothing to fear from even the most exacting cross-examiner. What is probably happening when we find being a witness an unpleasant task is that we are paying the penalty for our indolence in training ourselves to think carefully and accurately. We really have no right to resent being jerked up in such a fault. It should be our object in life to make the greatest possible development of ourselves. Then, there is that self-interest that comes in. We never know how soon we shall ourselves need the help of our fellow citizens to give evidence in our behalf.

We are to remember, too, that the matter of giving evidence in court is not a matter of choice. About the only real effective way to avoid performing the duty is to die. The remedy there is worse than the disease. Our courts may compel a person to attend as a witness upon the proper fees and expenses

being tendered him.[8] Our course could not very well function without this power to compel the attendance of witnesses.

Statutes Regulating the Employment of Women. It is enacted by statute that no woman shall be employed for more than sixty hours a week nor ten hours a day in any laundry, bakery, factory, workshop, store, manufacturing, or mercantile establishment, hotel, restaurant, telephone or telegraph office. Nor is any girl under twenty-one years of age allowed to work in any gainful occupation except domestive service and nursing for more than sixty hours a week or ten hours a day. The same enactment provides that seats must be provided where women are employed, one seat for every three women employed, and that they shall be allowed to sit down when not necessarily engaged in the active duty for which they are employed. Also every firm or corporation employing women must provide suitable washrooms and closets. The law requires that a time book be kept which shall be open for inspection by members of the state labor department. It is further required that a copy of that act shall be posted at the entrance of such establishments employing women.[9]

To see that such laws are strictly obeyed, there is a department of labor consisting of a chief labor inspector, who may be either a man or a woman and four deputy inspectors, two of whom must be men and two women.[10]

Employment of Children. The law has sought to provide the best possible protection for children and to prevent their exploitation. It is made a misdemeanor for anyone to employ or exhibit a child under the age of sixteen in begging, peddling, any indecent or immoral occupation, or when such child

9. Ibid., section 1734.
10. Ibid., section 4866b-1 et seq.
11. Ibid., section 33a-2

is an idiot or insane, or in any practice or exhibition of unusual danger. No child between the ages of fourteen and sixteen years of age is to be employed in any factory, mill, workshop, mercantile establishment, store, office, printing establishment, bakery, laundry, restaurant, hotel, apartment house, theatre, motion picture establishment or in the distribution or transmission of merchandise or messages unless he has an employment certificate issued by the local school authorities. No child under fourteen years of age is to be employed in these occupations, nor is such child to be employed in any occupation during that part of the year when the schools are in session. And no child under fourteen is allowed to perform in any theatre. A resident child may not preform in any theatre between the ages of fourteen and sixteen. A non-resident child may. A child under sixteen years of age is not to work in certain enumerated occupations which are dangerous to his health, nor is he to work in any occupation more than forty-eight hours a week, nor eight hours a day.[11]

The 1934 legislature passed a rather lenghty act for compulsory attendance of all children between the ages of seven and sixteen at school.[12]

Workmen's Compensation Act. Until recent times whenever an employee was injured there was no way for him to secure compensation from his employer except to sue. He was even then subject to certain defenses the employer might set up. The employer might plead that the employee was negligent himself or he might plead that the employee had assumed the risk. All was changed by the adoption of the so-called Workmen's Compensation Act. This act became law in 1916. There have been numerous amendments since that date.

The purpose of workmen's compensation acts was to cut down the expense involved in litigation under the

---

11. Ibid., section 331a, et seq.
12. 1934 Supplement to Carroll's Ky. st., 4434-1 et seq.

old method of putting the burden of injuries to workmen upon the cost of the product manufactured and to save as much of the amount paid for the injured party. Under the old system nearly every injured workman when he made his final settlement with his attorney was inclined to ask as one man did, "Who was it that was injured in this accident, you or me?" The statute was a recognition that injuries to workmen constitute one of the costs of production and should be charged up in the price finally paid by the consumer.

The act provides that where three or more men are employed in business or manufacturing, domestic and agricultural employment and carriers otherwise covered being excluded, the employers shall be liable to their employees for injuries or diseases arising out of the employment. The statute fixes the amounts to be paid in case of injury or death. So much is given for the loss of an eye, a leg or an arm. The amount or per cent of the weekly wage of the injured employee is set out in the schedule. Payments are usually to be in weekly installments for certain periods of time. A board is provided for, the members of which are appointed by the governor for a term of four years. This board sees to the enforcement of the act.[13]

The statute has not done away with the necessity of resorting to the law courts wholly. This could hardly be expected. The most litigated question under the act is whether an injury arises out of and in the course of the employment. For instance a night watchman while on duty was killed by the paramour of his wife in order that the murderer might be rid of the night watchman. Was death here one arising out of and due to the employment of the night watchman? The court held that it was not and no compensation was due under the Act.[14] In another case an employee was shot and killed while walking home at night after work, by a robber who thought the employee was taking home for safekeeping

13. Carroll's Ky. Stat., 4880 et seq.
14. January-Wood Co. v. Schumacher, 1929, 231 Ky. 705 22 S. W. (2d) 117.

cash belonging to the employer. It was held that his death did not arise out of and in the course of employment.[15] In still another case a teamster driving on the highway was stopped by construction work. While waiting for the removal of the obstruction, he went a short distance from the highway and sat down under a tree. When the obstruction was removed, he started back to his team and while in the road and while near his team he was run over and killed. It was held that[16] death here arose during the course of employment. However, where a tipple foreman was killed outside his employer's camp while pursuing an alleged law violator, it was held that he was acting in his official capacity as deputy sheriff and not as a peace officer in behalf of his employer and hence death did not arise out of and in the course of his employment.[17]

Old Age Pensions. Another bit of social legislation that is of special interest at the present time, in view of the recently passed federal statute is that granting old age pensions. Many of the states have already enacted statutes granting such pensions before it was considered by the federal Congress. These state acts vary very widely in the conditions under which pensions are given, the age limit at which a person becomes eligible, and the amounts given.

The Kentucky statute was passed in 1926 and puts the responsibility of carrying out its provisions on the fiscal court or county commissioners of each county. They are empowered to levy taxes to meet the needs for such pensions as they may grant. After the system has been in operation one year or more, any

15. Porter v. Stoll Oil Refining Co., 1932, 242, Ky. 392, 46 S. W. (2d) 510
16. Warfield Nat. Gas Col, V. Muncy, 1932, 244 Ky. 213, 50 S. W. (2d) 543
17. Kenmont Coal Co. v. Summers, 1932, 244 Ky. 232, 50 S. W. (2d) 515.

county is free to abandon the system. Persons to be eligible must be seventy years old, have lived in the United States fifteen years, in the state and county where they apply ten years immediately preceding the date of their application. The amount granted is to be fixed by the county judge, but in no case is it to exceed two hundred dollars a year; one who receives a pension from the federal government, a state government or a foreign state or any other source which when added to his earnings will amount to four hundred dollars; any one who is a professional beggar; any one who has an income from any source in excess of four hundred dollars is not eligible for a pension. If the pensioner dies leaving any estate, reimbursement to the amount of the pension paid is to be had from such estate. A penalty is attached for fraudulently misrepresenting one's financial condition in his endeavor to secure a pension.[18]

The federal act passed at the last session of Congress is worked out on the annuity idea. It is really insurance. An "Old Age Reserve Account" is provided for which is under the supervision of the Secretary of the Treasury. Any state securing the benefit of this fund must enact an old age pension law conforming to certain requirements. The federal government will then pay one half of the amount required in the carrying out of such acts by drawing on its reserve account. The age limit fixed by the federal government at which payments begin is sixty-five. There are certain classes that are excepted such as those engaged in agricultural labor, domestic service and several other lines of service.[19]

For the state of Kentucky to take advantage of this federal act, a thorough revision of its present law or an entirely new statute will have to be enacted by the state legislature at some future session.

---

18. Carroll's Ky. St., section 9381-1 seq.

19. USCA Title 42, section 301 et seq.

PROPERTY

The term property has many definitions. The one most generally accepted is that it is the sum total of the rights which you may lawfully exercise over some particular object or tract of land to the exclusion of others. The common law has always dealth with property under two years, personal and real. Land and all things attached to land, buildings, fences, and the like have been treated under the title of real property. All things not attached to land or regarded as part of the land were considered under the heading of personal property. As the early writers would say, real property consists of lands, tenements, and hereditaments, and personal property consists of all objects which are subject to ownership except land.

Property Rights of Women Under the Common Law. Under the common law, an unmarried woman had the same rights in regard to the ownership and control of property as a man. Marriage, however, wrought a very great change in woman's property rights. The law took the Scriptures literally and a husband and his wife were considered one person, and that one was the husband. The wife's legal identity became merged in that of her husband. All the wife's personal property, her money, furniture, or anything else she possessed, became the property of her husband upon marriage.[1] All the claims she might have against other persons became the husband's upon his reducing them to possession during coverture, that is during the duration of the marriage relation. If the wife survived the husband, choses in action - that is claims against third persons - which the husband had not turned into cash or credit to his account, remained the wife's. Her leasehold estates the husband might sell and keep the money received for them. On the wife's death before that of her husband, any personal property, that the husband had not already re-

1. Robinson - Elementary Law, Rev. Ed., Section 174.

duced to possession, became his. The husband had the use during coverture of any real property that the wife owned. He could take the rents and profits therefrom as his own. If there were a child born of the marriage, which might inherit the lands of the wife, the husband acquired by courtesy of the laws of England, a life estate in such lands. The wife's real property on her death went to her heirs at once unless the husband had acquired a life interest by courtesy. The wife, should she survive her husband, acquired a life interest in one-third of the lands the husband was seized of during coverture, whether there were children born of the marriage or not. This was called her dower interest.[2]

These rules of the common law were harsh and worked hardships not only upon the wife but upon her family as well, especially where the wife was possessed of a large estate consisting wholly or largely of personal property and died shortly after marriage. In such a case great wealth might be shifted from one family to another. If the husband were to die shortly after coming into possession of his wife's personal property, such property would go to his personal representative, his next of kin, who would have no moral claim thereto.

Equity, however, interfered in behalf of married women and worked out rules governing their property rights possibly as complete, if not more complete, than the protection later given married women under the so-called Married Women's Acts. Our legal system is a two-decker affair, as one learned authority has put it. Down stairs is the common law court and upstairs is the equity court. If the law court cannot give a person relief because his case does not fit into one of the types of action dealt with in the law courts, he might appeal to equity for relief. A prerequisite to such relief was the condition that there should be no adequate remedy at law. Equity was able

---

2. A. V. Dicey, Law and Opinion in England, p 370 n. 2

to give relief to married women in the first place, because in order to reduce a wife's choses in action to possession, the husband was obliged to go to equity for help. Equity applied its well-known maxim that "he who would have equity must do equity" and compelled the husband to make adequate provision for the wife out of her estate as a condition to lending its aid in reducing the wife's claims to possession. If a legacy were left the wife for her sole and separate use, the husband could not get it except through equity and the chancellor, who presided over the equity court, would impose a trust upon the husband and make him hold the proceeds for the benefit of the wife. With the husband a trustee of the wife's estate, equity compelled the husband to do with the property as the wife directed. Of course it became an easy matter for him to induce her to direct that it be disposed as he wished. Lord Thurlow invented the remedy for this difficulty, restraint on anticipation, which made it impossible for her to alienate the property or to charge it with debts during coverture.[3] If the proper words were put into the will or instrument that gave the property to the wife, she could dispose of the income only. Equity made the husband trustee of the rents and profits but would not make him account for the wife's money more than one year back.

Equity did not purport to give a married woman the right to contract even in regard to her separate estate. It did give her power to create debts against her separate property. If she had no separate property at the time a debt was contracted but acquired a separate estate later, this estate was not bound by the debt and could not be taken to satisfy it. Equity gave her power to devise or bequeath by will her separate property but not power to dispose of property which was not held for her sole and separate use.

Married Women's Acts. The property rights of

3. Ibid., pp. 375-377.

married women underwent a great change during the latter half of the last century, through legislative enactment of the so-called Married Women's Acts. The first in Kentucky was passed in 1846.[4] It provided that slaves and real property belonging to the wife at the time of the marriage, or given, devised, or descended to her during the marriage should not be subject to the payment of the husband's debts, created either before or after the marriage. It further provided that the life estate of the husband in the wife's lands should not be sold by process of law except after the death of the wife, the husband surviving her. The husband and wife could convey lands of the wife by their joint deed.

The legislature of 1868 passed an act providing that where real estate had been or should be conveyed to a married woman for her separate use, without the intervention of a trustee and without restriction on the sale or conveyance of the same, she should have the same right to sell or convey such property as she would if the property had been conveyed or devised to her absolutely, without any separate use being expressed; but her separate use should continue in the proceeds of the sale. It recognized the wife's right to deal with her separate property at law as she had dealt with it in equity.

The so-called Weissinger Act was enacted in 1894. It purported to give the married woman the same right to deal with her general estate as the Act of 1868 gave over her separate estate. It is, in fact, generally supposed to have given her full control over her property, both personal and real, the same rights that an unmarried woman had, except that in order to convey land, her husband must join in her deed to effect a valid conveyance.[5] It was held that this act did not apply to property in which the husband had already acquired a vested right by marriage before

---

4. Acts of 1846, p. 42.

5. Carroll's Ky. Stat., Sections 2127, 2128, 2131, 2147

the passing of the act.[6] The disability that a married woman cannot make a valid conveyance of her realty without the husband's joining in the deed, does not appeal to women as being a limitation of their rights. Wives are accustomed to signing their husbands' deeds when their husbands convey real estate and the requirement that their husbands join in their deeds seems a reciprocal matter. This, however, is far from the fact. When a wife signs a deed of the husband conveying his land, it is for the purpose of waiving any dower right she may have had in the land conveyed. The husband can pass good title to the grantee even if the wife refuses to sign the deed. The grantee, of course, would take subject to her dower right. If she should survive her husband, she would have a life interest in one-third of the land conveyed. As a practical matter, not many persons would be willing to purchase land subject to such a contingency. There is usually other land one can get that will answer his purpose just as well. If the purchaser were very anxious to secure this particular piece of land and the seller's wife were unwilling to sign the deed, the purchaser might be willing to take a chance on the husband's outliving the wife; or the prospective buyer and the husband might enter into a contract whereby the husband would covenant to make such provision for the wife in his will that there would be little likelihood of the wife's waiving her rights under the will and claiming her common law dower in case she should survive the husband; or the husband might give a bond binding his estate to indemnify the purchaser if the wife should survive and claim dower in the land conveyed.

Even under the present statute there are special instances where the wife may convey her land without the husband's signing the deed. These exceptional instances are (1) where the husband has abandoned the wife, (2) where he is confined in the penitentiary,

---

6. Rose v. Rose, 1898, 104 Ky. 48, 46 S. W. 524. Mitchell v. Violett, 1898, 104 Ky. 77, 47 S. W. 195

and (3) where he has become permanently deranged in mind. In these three instances, she may convey her lands as if she were an unmarried woman, provided she first secures the permission of a court of equity.[7] It is difficult to see any justice in putting the owner of real property to the inconvenience of going to a court of equity for permission to convey what the law and everybody concedes is her own. Such a statute can be justified only on the ground that a married woman is not competent to convey real estate without advice, which is to be given by a court of equity when the husband is so situated that he cannot give it. Learned judges, however, have held a different view of the matter. In Brady v. Gray[8] the wife attempted to convey her land while her husband was in a distant state. The court in holding the deed void, said: "This case aptly illustrates the wisdom of the statute that precludes the wife from conveying her real estate without her husband uniting with her." In Phillips v. Hoskins,[9] the court came nearer to giving an explamtion for the difference. It said:"The purpose of the statute in requiring that the husband must join in conveyances of the wife's land is not only to protect the husband in his rights, but to protect the wife by giving her counsel and guidance of her husband."..... "To be a conveyance of the wife's land under the statute, the deed must be the valid act of the husband, otherwise he has not conveyed." From this languago it would seem that the husband has some property right in the wife's realty to be protected. The statute says a married woman has the same right to hold and acquire property,both real and personal,as if unmarried. The husband's inchoate right to a life interest in one-third the wife's realty on the death of the wife before that of the husband,certainly cannot justify the difference in result,because the wife has the same inchoate interest in the husband's property.

This failure to give a wife an equal right with

---

8. 1895, 17 Ky. L. Rep. 512, 31 S. W. 734.
9. 1908, 128 Ky. 371, 108 S. W. 283.

her husband in the matter of conveying real property works hardship under certain circumstances. Consider the situation in the case of Rose v. Rose[10] where the husband and the wife had permanently separated. If the wife is the one who has left the husband, the case would not come within the provisions of the statute providing for her securing the permission of a court of equity to convey. In such a case she would be unable to convey her land. Or take the case where the wife has a good offer for her land and the husband, through spite or some other whim of his own, will not join the deed. A court of equity has no authority or power to compel him to sign the deed as it could in the case of the wife's separate property before the present statute was passed. Furthermore, suppose the case where the wife is over twenty-one years of age, but the husband is still a minor, that is under twenty-one years of age. The wife has an advantageous offer for her land but the prospective buyer does not want to enter into a contract for the purchase of land that can be avoided by the seller's husband when the latter becomes of age. The law gives such a right to a minor who conveys his realty. In Lockhart v. Kentland Coal and Coke Company,[11] a woman made a contract for the sale of mining rights on her land. She married a minor and then executed a deed in which her husband joined. The court said the deed was void but as the husband had not joined in the petition to set aside the conveyance, it held the wife could not have the relief sought.

Another disadvantage under the present statute is that a wife cannot make a direct conveyance of her land to her husband; since as the court pointed out in the case of Sayers v. Colemen,[12] the husband must join in her deed and a person cannot be both grantor and grantee at the same time. A husband, nevertheless, may convey directly to his wife. Of

10. Supra, n. 6.
11. 1918, 182 Ky. 673, 207 S. W. 18.
12. 1872, 5 Ky. Opinions, 733.

course, a wife and husband may convey her land to a third person, who in turn may deed the land back to the husband. This is, to say the least, a rather clumsy way of passing property from a wife to her husband and involves extra cost.

It is interesting to note that although a wife cannot convey her own land without her husband's joining in the deed, she may transfer land she holds in trust for another without her husband's joining in the deed.

Incidents of Real Property Ownership. We have seen that under the statutory changes that have been made in comparatively recent years, a married woman today has all the rights of ownership of real property that an unmarried woman has, with the exception just considered, namely, the necessity that her husband join in a contract to convey her land or in her deed to effect the transfer of it. We will now consider some of the more important incidents of the ownership of land.

The law recognizes several different interests in land at the same time. A farm, which we will call Blackacre, may be leased to A for a term of five years. B may be entitled to have Blackacre after A's lease expires, for the period of his, B's, life and C may be entitled to have the farm upon the termination of the two prior interests, in fee simple. A's estate is called a leasehold interest or a term for years and is treated by the law more like personal property than like real property. It is called a life estate. It goes without saying that it is not inheritable. C's interest is a fee simple, the most absolute interest recognized by law in land. Since there are prior estates which must terminate before C can come into enjoyment of his estate, it is to be a fee simple in remainder.[13] Where a person is occupying land subject to the will of the true owner, he is said to have a tenancy at will.

13. Blackstone's Commentaries, II, 103; Robinson-Elementary Law, Rev. ed., 45.

Such an occupancy can be brought to an end at either the will of the tenant or of the landlord. There is a fifth estate or interest recognized in land by the common law, an estate in fee tail. In such an estate the land was given to a man and "the heirs of his body male" or "female" as the case might be. He had the use of it for his life and at his death it passed to the heir specified and then in turn on down the line of succeeding heirs. The idea was to so tie up the title that the estate would be kept in the family indefinitely. Such estates have not been deemed in keeping with our democratic ideas and as a consequence, they have been abolished in this country with the exception of one state, Massachusetts, where they may be terminated by the holder at any time during his life by simply giving a deed of the premises in fee simple. There are two types of statutes abolishing estates tail, one turns the estate into a fee simple in the first taker and the second type gives the first taker a life estate and the heir a fee simple.[14] Kentucky has the first type. People continue to draw wills giving land to a son and the heirs of his body, which language under the old law created a fee tail. the court, under the statute, construes this gift as a fee simple. The son takes the land as absolute owner and can freely convey it to a stranger. Furthermore, it is not uncommon in this state to hear a person speak of such and such land as being entailed. This, of course, is not an accurate statement of the situation. What is probably meant is that the land in question has been given to a man for life with remainder in fee simple to his children.

We have said that a fee simple is the most absolute estate known to law. Even in the case of a fee simple there are limitations on the owner. He cannot dig his land up and carry it away so that his neighbor's land will fall into the excavation. He owes his neighbor the incident of lateral support to his land. The state may need his land for some public use. It can take it against his will under the right

14. Carroll's Ky. Stat. 2343

of eminent domain, or it may take it for the use of a public service company. Here the interest of the individual owner of property must give way to the larger interest of the public as a whole. Then, too, it is possible for a man to gain interests in the land of another. He may do this by contract or he may gain it by adverse use through lapse of time. A, who is the owner of Greenacre adjoining the land of B, which we will call Blackacre, may drive across some part of Blackacre for a period of fifteen years and at the end of that period he may gain the right to do so at will for the future, provided he has done so without B's permission, and the use is open, notorious and under claim of right. This shows us that we must keep an eye on what our neighbor is doing.

In connection with the ownership of real property, it is well to keep in mind that under the so-called Statute of Frauds that any contract dealing with any interest in land must be evidenced by writing in order to be enforceable in the courts. This objection to the enforcement of what we think is a perfectly good contract, comes up in many different ways. It is complicated in most states by the modifying doctrine that part performance of an oral contract as to land will take it out of the Statute, a doctrine however, that is not recognized in Kentucky and three other states. Consider a recent Kentucky case. The plaintiff ran a show for the defendant's testator in the state of Mississippi and sent all the proceeds therefrom to the testator in Paducah, Kentucky, who orally promised to invest the money so received, in real estate and on his death to devise half of it by will to the plaintiff. He died without having made provision in his will for the plaintiff. The court held that plaintiff could not recover a half interest in the land as the promise came within the statute and should have been evidenced by writing. The court, however, said the plaintiff might recover for the value of his services.

A very common case to arise is where an uncle, say, promises to give his niece his farm if she will

come and take care of him in his declining years. The niece, after spending several years in the uncle's service, learns on the uncle's death that the agreement is unenforceable because it was not put into writing. Such an agreement might be enforced in most states as it would be a contract performed on the part of the niece. Had the uncle promised to give her a sum of money or his United States Steel corporate bonds for taking care of him, the promise would not have been within the Statute and she would have enforced it.

One of the chief differences between real and personal property is found in the methods of transferring. The transfer of real property is attended with more formalities than that of personal. The Kentucky statute provides that no interest in land for a term of more than one year can be conveyed except by deed or will.[15] It further provides that deeds may either be of general warranty or special warranty. The latter is more generally called a quit-claim deed. A warranty deed carries with it three warranties or covenants; a covenant against incumbrances, a covenant of title, that is that the grantor has title to the lands conveyed, and a covenant of quiet enjoyment, that the grantee will be undisturbed in his possession. A quit-claim deed conveys all the right, title and interest that the grantor has. It warrants only against acts of the grantor.

Kentucky, like the other states of the Union, has a recording system which serves to protect the grantee against a further conveyance of the grantor to another person and also to protect a prospective buyer. As recording is for the grantee's protection it is his duty to see that the deed is put on record. Suppose that A grants Blackacre to B who fails to put the deed on record; and then A later grants to C, who has no notice of the prior conveyance, and that C first puts his deed on record, C would prevail and B would be left to an action to make good

15. Carroll's Ky. Stat., Sec. 490

his loss against A.[16] A prospective purchaser of land should have the record searched and a record made of the various conveyances. This record is called an abstract of title. A purchaser will be charged with notice of any defect in title that the record may show.

Not only are deeds required to be recorded, but mortgages are also required to be put on record, A mortgage originally was a deed of land to a creditor to secure a debt. There was an agreement in another instrument whereby the mortgagee agreed to reconvey upon the repayment of the loan. As time went on the two instruments were combined and the mortgage became a deed of the premises with a defeasance clause, which provided that the deed should become null and void upon the mortgagor's paying a certain amount at a certain date. Under the common law theory of mortgages, the mortgagee is regarded as having the title to the land. Some seventy-five years ago the so-called granger states of the central west did not like the idea that the money lenders of the older states were holding the titles to their farms, so they passed statutes to the effect that a mortgage should be only a security of the debt, a lien, and not a transfer of the title of the property to the mortgagee; and such is the status of a mortgage in Kentucky.[17] When a mortgage is paid the mortgagee should see to it that an annotation of the release of the same is placed on the margin of the record. In most states the mortgagee who fails to record the release is subject to a fine of fifty dollars.

There is one point further in regard to the ownership of property that should be of especial concern to those women who are interested in the maintenance of a home, and that is that the law allows certain property exemptions when property is seized to satisfy a creditor's claim. These exemptions are wholly

16. Ibid., section 495.
17. Civil Code of Practice, section 374.

statutory. The statute provides that a certain amount of personal property, notably tools, libraries of professional men and the implements used in gaining a livelihood, shall be free from the claims of creditors.[18] Furthermore, a householder is allowed an exemption of one thousand dollars in value in his home. The statute provides that before a sale under an execution or judgment shall be made, the officer in whose hands the writ is, shall have the homestead valued and set aside. It behooves one then to claim his homestead right at the proper time. Of course, he may contract away this right to homestead when a mortgage is given, and that is just what usually happens.

18. Carroll's Ky. Statutes, 1697-1703.

DESCENT AND DISTRIBUTION OF PROPERTY

What happens with a person's property when he dies? Suppose that he has very definite ideas as to how he would like to dispose of it, when he is through with it. The legislature has made provisions whereby he can carry out his wishes in the matter. Suppose he is so absorbed in accumulating his wealth that he thrusts aside the thought that he will not always be on earth to enjoy his holdings. The law has made provisions for taking care of that situation too. By statutory enactments it is provided that a man may make a will directing how his property shall be disposed of. Where there is no will, and there are heirs and next of kin, our statutes direct the distribution among them. If there are neither heirs nor next of kin and no will is made, then there is a provision made that it shall go to the state. This last disposition is usually referred to as escheat.

Escheat. Let us consider the last named first. The disposition of property on the death of the owner reveals one of the most marked distinction between real and personal property. Generally speaking, the two do not follow the same course of descent or distribution. In the large we say that real property goes to the heir, or heirs and personal property goes to the next of kin. In this country, the heirs and next of kin are generally the same persons, so that distinction is not so real as theoretical. In England, under the earlier law, the rule of primogeniture prevailed; that is, a man's real property went to his oldest son. He had but one heir at a time. The younger children were his next of kin, often referred to as his personal representatives. Our land law had its source in the old feudal system in which the king was regarded as the great landlord, holding all the land in the kingdom. This land was parcelled out to his followers who owed the king some

service therefor, such as serving on military expeditions when required or paying him money. These followers in turn gave out the land they had received to their followers, and so on down the line. There was tenure, a holding under some body. The overlord wanted some one in on the land who could discharge the feudal dues to the lord. If a man died without an heir, then the lord put some one else in on the land. On our gaining our independence from the king of England each state succeeded to the rights of the king of England and so became entitled to land owned by one who died without making a will and without heirs. Some states say by statute that there is no tenure in that particular state. That is true of Kentucky, but there is a statute which says that land shall go to the state where the owner dies without leaving a will and without heirs. You get the same result there that they got under the feudal system.

The state also takes a man's personal property where he has no next of kin and no will disposing of the same. This is worked out in most states on the theory that originally the king was the parens patriae, the father of his country, and, therefore, succeeded as next of kin when there were no other next of kin. The Kentucky statute covers personal property as well as real.[1] It also provides that where there are heirs or distributees who do not claim the estate with in eight years, the property not so claimed shall go to the state.

Where One Dies Without Leaving a Will. Where a person dies leaving property without leaving a will, the statute determines the persons who shall take it and the amounts that each shall take.[2] If a person is unmarried, that

1. Carroll's Ky. Statutes, section 1608.
2. Ibid., section 1393, 2132.

is a widower at the time of his death, his property both real and personal goes to his children and their descendants. If there are none, it then goes to his father and mother, one-half each, if both are living; if either is dead then the whole estate goes to the survivor. If there are no children and neither father nor mother living, the estate goes to the intestate's brothers and sisters and their descendants. If there are no brothers and sisters or descendants, then one-half of the estate passes to the paternal kindred and one-half the maternal, first to the grandparents, if any, if none, then to uncles and aunts; and then to more distant relatives in the order named by the statute. If the intestate leaves a wife, and there are no kindred; then the whole of the estate goes to the surviving wife, or if it is the wife's estate that is being settled, it goes to the surviving husband.

Suppose it is the estate of a married man or woman who leaves a child or children surviving as well as the wife or husband, whichever it may be. The real estate there goes one-third to the wife, or husband, for life and two-thirds is divided equally among the children and upon the death of the surviving wife or husband, the other third is equally divided among the children. In the case of the personal property the survivor takes one-half, and the other half goes to the children in equal division. In the case it is the wife who survives, personal property to the amount of seven hundred and fifty dollars is exempt from distribution, and sale is set apart for the widow and children.[3] Where a child is dead and leaves a child or children, such children take the share of their deceased parent. Wherever a parent has made an advancement during his life to a child, that is, has given him money to set him up in business and the like, this amount is

3. Ibid., section 1403.

to be deducted from such child's share.[4]

Suppose there is no child, but the parents of the deceased man or woman are living or that one of the parents is living. There the surviving wife or husband takes one-third of the real property for life, and the two-thirds is divided between the parents, if both are living or all of it is given to the survivor, if only one parent is living. On the death of the wife or husband her or his third is given to the parent or parents. In the case of personal property, one-half is given absolutely to the wife or husband the other half is given to the parent or parents.

Suppose there is a wife or husband left, but no children, or parents, living. There the surviving spouse takes one-third of the real for life and one-half of the personal absolutely and the rest is given equally to the brothers and sisters of the deceased. At the termination of the life estate in the one-third interest, also goes to the brothers and sisters.

If you have a case where there is no wife or husband surviving, and there are children, both the real estate and personal property is divided equally among the children; and if there are no children; then it is equally divided between the father and mother of the deceased.

Disposing of Property by Will. Disposing of property by will is wholly a statutory matter. It is here that the importance of the distinction between real and personal property emerges. Before 1540 land was not devised except by local custom. A man might alienate his land during his lifetime, but if he did not so convey, at his death his heirs must take. The right to will personally seems to have been recognized by ecclesiastical courts in England from earliest times. There an oral will was good. After the statute

4. Ibid., section 1407.

of Frauds in 1677, wills were required to be in writing unless it were a noncupative will. That was a will made by a man in extremis, that is at the point of death. The dying man told a witness or witnesses how he wanted his property disposed of.

Requirements. To make a will, there must be a testator of sound and disposing mind, free from undue influence, free from fraud. Testamentary capacity does not mean any high degree of intelligence. A person may be much enfeebled by sickness, disease or depression; but if he has a sound mind and can appreciate the nature of the act, it is enough. The Kentucky statute provides that any one of sound mind and more than twenty-one years of age may make a will.[5] In this state the will must be in writing subscribed by the testator and signed or acknowledged as his will in the presence of two witnesses who shall also subscribe thereto; unless the will is in the testator's handwriting in which case no witnesses are necessary. This kind of will is known as a holographic will. If a person who has executed his will wishes to make changes in the distribution of his goods, he may do so by another writing, executed in the same way as the original will. This writing is known as a codicil. There is no limit as to the number of codicils a man may execute. The latest disposition of a chattel or piece of property will prevail over an earlier inconsistent gift or it.

The law has laid down no requirement as to the material on which the will must be written. Nor has it siad that it must be written in ink or with any other particular substance. It is sufficient if it is in writing of some kind and on something. There is a case where a man wrote his will on a shirt cuff.

---

5. Ibid, sections 2147, 4825, 4826

No particular language is necessary, nor does a will have to be of great length. Many noted wills that have disposed of large holdings have been very short. The following is a will that should meet the requirements of the statute of any state in the Union:

"I, Richard Roe, of Lexington, Kentucky, do hereby make my last will and I revoke all previous testamentary dispositions made by me.

1. I give my horse Bess to James Clark.
2. I give one hundred shares of Louisville & Nashville stock to my niece Ann Jones.
3. I give $1000. to Sarah Clark.
4. All the rest of my property, of whatsoever nature to which I may be legally or equitably entitled, or over which I may have any power or appointment, I devise, bequeath and appoint to Erma Lou Brown, Mary Jane Smith, and Andrew S. Doe, their heirs, executors, administrators and assigns, as tennants in common.
5. I appoint Edwin J. Snow to be the executor of this will, and I request that no security be required of him for the faithful performance of his duties.

In witness whereof I have hereto set my hand and seal this tenth day of July, 1935.

Richard Roe. (L.S.)

Signed, sealed, published, and declared by Richard Roe, the above named testator, as and for his last will and testament in the presence of each of us, who thereon at his request, in his presence, and in the presence of each other, subscribe our names hereto as witness. This tenth day of July, 1935.

Evelyn Choate
Beverly Benton
Kenneth Riggs."

This will should be good in every state. In Kentucky and many other states only two witnesses are required, but in many states three

are required. No seal is required in this state. The will should be all in one document, unless there is a codicil, which would be in a separate document. The witnesses should be competent. Any one who takes anything under the will is not competent to be a witness. In such cases the usual rule is that the witness is held competent but the gift to him is held void. The witnesses and the testator should be in the same room where everybody can see the other sign and everybody should remain till it is all over. However, in some jurisdictions the witnesses need not sign at the same time nor in the presence of each other. The testator should sign at the foot or end of the will, declare it to be his signature to his will and request the witnesses to sign as witnesses. The witnesses should then sign in the testator's presence and in the presence of each other.

In spite of the request in the will submitted, that no security should be required of the executor, many states require bonds to be given In Kentucky a bond may be required of an executor and must be required from an administrator .

Now it does not follow because a will does not conform to all the requirements of the statute in the state where it is offered for probate, that is filed in court for the administration of the estate, that it is ineffective. Take a concrete case that came in from another office where the attorney handling the probate of a will in the domicilary state had entered the army and left his practice to the care of another lawyer. The testator had made his will while passing the winter in another state and had died there. In that state only two witnesses were required in the execution of a will. Three were required in the state of the domicile, where all the property was located. The voluminous correspondence disclosed that the attorney in the home state had advised that the will first be probated in the

state where the testator died and then probated a second time in the home state under ancillary or supplementary proceedings. That was the course followed. Had the lawyer in this case been better versed in the statutes of his own state, we would have noticed that a statute specifically provided that wills good where executed could be probated in his state and in this particular case, a will with two witnesses would have been good, although three witnesses would have been required had the will been executed in the home state. He might have saved his clients the costs of probating the will once.

In another case a will was brought to a firm of lawyers in a state where three witnesses were required. The will had but two witnesses to it. One devise was of lands in California, a state that required but two witnesses to a will. They advised that the will was no good. It came into the hands of another lawyer, and he had it probated in California, where it was effective to pass the title of the California land.

It is possible to make a conditional will. A man might write in his will, "If I never marry, this is to be my will." He does marry. The instruments should not be admitted to probate. Suppose he had said, "This is to be my will, if I marry." That would not be good as a man cannot be allowed to reserve a power to make a will subsequently. Marrying is not a testamentary act, however. Our statute provides that "every will made by a man or woman shall be revoked by his or her marriage except a will made in exercise of appointment when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin."[6]

If a legatee or devisee named in a will dies before the testator, it is provided that issue

6. Ibid., section 4832.

of such legatee or devisee shall take his share unless a different disposition is provided in the will.[7] If a man leaves a will and had a child or children whom he believed dead at the time or has a child born to him after his death, such child or children take such share, or shares, as he, or they, would have taken had there been no will made.[8] There is an erroneous popular belief that if a man has children and dies leaving a will in which nothing is given to a child, the will is invalid. The thought is that he must at least give the child a dollar. The practice of so doing in many places is purely a matter of evidence that he had the child in mind when he made his will. Had he said in his will, "Having in mind my daughter, Mary Ann, I give all my property to my son, James," it would have answered the purpose just as well as giving Mary Ann the sum of one dollar. It shows that he had not forgotten her or that he believed her to be dead at the time he made the will. Furthermore, the fact that he does not leave something to, or mention a son or daughter, might be used to show that he was not of sound and disposing mind since he could not remember that he had such a son or daughter at the time.

Probate of Wills and Administration of Estates. The first thing to be done upon the death of a person who dies leaving a will or an estate without leaving a will, is to apply to the proper court for probate of the will or administration of the estate. The court in this state that has jurisdiction over the estates of the deceased persons is the county court of the county in which the deceased was a resident if he had a residence in the state.[9] Appeals from the

7. Carroll's Ky. St., section 4832.
8. Ibid., sections 4842, 4847, 4848.
9. Ibid., section 4849.

orders of this court may be taken to the circuit court. At least one of the attesting witnesses, if a will is being probated, should appear at the court and give evidence as to the execution of the will. If the witness lives at a distance a deposition may be taken, that is a sworn statement of the facts of the execution of the will. Notice is issued to interested parties and an opportunity is given them to appear and contest the probate, if they wish. The will becomes a part of the records of the court and remains on file so that anyone may see it, if he wishes. The statute provides that if the person making a will wishes, he may file his will with the clerk of the court for keeping, upon the payment of a fee of one dollar.

In this state, an executor must give a bond when required and every administrator appointed by the court must give a bond. The premium for such bonds is charged to the estate of the deceased. Each executor and administrator takes an oath to faithfully perform his administration of the estate given into his charge. A letter of administration is then issued which is evidence of his appointment. No suit against the estate can be commenced until six months after the appointment of the executor or administrator. The court appoints three persons as appraisers whose duties are to appraise the estate as the personal representative shall exhibit it to them. If the personal representative signs this appraisal, it becomes an inventory of the estate that has come into his hands. Then within a reasonable time, the personal representative shall sell the perishable goods. He shall sell sufficient of the personal estate to pay the debts, if necessary. The personal representative after two years is charged with interest upon surplus assets in his hands after the debts are paid. He may distribute the estate after nine months after his qualifying as executor or administrator.

Upon filing of his account with the court and the approval of the same, his bond is discharged and he is released from further duties. Due notice, of course, is given by publication of the time and place for the hearing of the final account so that any one objecting may appear and be heard.

The fundamental difference between an executor and an administrator is that an executor is named by the deceased and an administrator is named by the court. The testator may name any body or he may name nobody to act. If the person named by the testator has not sufficient understanding to act the court will not appoint him executor. The statute usually names certain immediate relatives of the deceased who are to be given preference in the selection of an administrator to handle the estate of an intestate person. If an infant, a person under twenty-one, is named executor by the testator, he cannot act during his minority. The court will appoint an administrator to act until the infant reaches his majority. Suppose the executor dies before he has settled the estate. The court there appoints an administrator with the will annexed. The old way of putting it was administrator cum testamento annexo.

Priority of Payment of Debts. By statute funeral expenses and expenses of the last sickness have priority in payment out of the funds in the administrator's or executor's hands. Then come expenses of administrating the estate; debts due the United States; debts due to states; then all other debts, judgments having precedence.

Trust Estates. Not only does the law allow a man to dispose of his property by will when he is through with it, but it will allow him to dispose of it in such a way that the beneficiaries of his bounty cannot squander it. The usual way of doing this is to leave the property to a

trustee or to trustees to hold and manage it and turn over the income or such part of the income as he shall name to his children or other next of kin. In a way this is a slur on the ability of his sons and daughters to manage what he has possibly earned by long hours of toil. Possibly he may have inherited from a frugal father. If so, the reflection on his own offspring is the greater. Or it may be possible that he has learned with the wisdom that comes with advancing years that it is much more difficult to keep a fortune once it is earned than it is to accumulate it in the first place. Whichever it may be, the law does allow him the privilege of creating a trust and putting the principal of his estate beyond the reach of his beneficiaries. In modern times it is not at all uncommon to find corporations acting in the capacity of trustees and there are certain advantages in this because the corporation officials are less apt to be moved by personal appeals on the part of the beneficiaries and also a large trust company is more than likely to have within its employ skilled managers to handle such funds.

Life Insurance Annuities. Still another way to put an estate beyond careless management on the part of the recipients is to invest the principal in annuities, whereby the beneficiaries may be assured a certain amount each year as long as they live.